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VOLUME I

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 340

THE UNITED STATES OF AMERICA, PETITIONER

vs.

NELSON B. UPDIKE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 23, 1929
CERTIORARI GRANTED OCTOBER 21, 1929

United States Circuit Court of Appeals
EIGHTH CIRCUIT.

No. 8241

UNITED STATES OF AMERICA, APPELLANT,
vs.
NELSON B. UPDIKE, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JUNE 23, 1928.

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a United States District Court, District of Nebraska, Omaha Division.

United States of America, Complainant and Appellant,
No. 853 vs. Equity
Nelson B. Updike, et al., Defendants and Appellees.

Be it remembered, that on the dates hereinafter shown, certain papers were filed and record made and entered in the above entitled matter, in the words and figures following, to-wit:

1 Amended Bill of Complaint.

United States District Court, District of Nebraska, Omaha Division.

United States of America, Complainant,
Number 853 vs. Equity
Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, Ed P. Smith, George A. Roberts, F. B. Johnson, Thomas Wolfe, Mary S. Updike, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, L. W. Schreiber, Isabella Thorpe, Jo Hamilton, Jos. P. McGrath, A. P. Murtagh, N. E. Murtagh, A. Pickens, Frank R. O'Neil, Henry Figard, Chas. Zinkey, B. R. Sloat, Alex T. Hart, Charles Figard, J. A. Dickinson, E. Stockham, S. S. Garvey, A. S. Tobey, Victoria Samuels, Edward A. Dusal, Frank L. Wood, George Loff, Bertha M. Bache, Mrs. A. H. Merchant, Mary Louise Jackson, J. B. Hill, J. Hervey Stout, Sarah Stout, Mrs. Nellie Goodwill, Grace E. Babcock, Mrs. J. L. Babcock, F. L. Babcock, F. O. Goodwill, F. J. Thatcher, Charles Howe, C. Arthur Howe, F. W. Aishton, F. A. Howard, Theodore E. Grow, Agnes Johnson, M. M. Betzner, C. J. Smyth, Hattie B. Updike, Lawrence B. Updike, Marjorie D. Updike, Clara McCardel, B. H. Updike, and Georgia E. Babcock, Defendants.

The complainant, United States of America, by its attorney, James C. Kinsler, United States Attorney for the District of Nebraska, complains of the above-named defendants and respectfully shows to the court:

I.

That at all times hereinafter mentioned the complainant was, and now is, a corporation sovereign and body politic.

II.

2 That at all times hereinafter mentioned the defendants, Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, Ed P. Smith, George A. Roberts, F. B. Johnson, Mary S. Updike, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, L. W. Schreiber, Isabella Thorpe, Jo Hamilton, Jos. P. McGrath, A. P. Murtagh, N. E. Murtagh, and Frank R. O'Neil, were, and now are, citizens of the United States and of the State of Nebraska, and inhabitants of, resident in, the Omaha division of said United States District Court in the State of Nebraska, within the jurisdiction of this court.

III.

That at all times hereinafter mentioned the defendants, Henry Figard, Chas. Zinkey, Alex T. Hart, J. A. Dickinson, A. S. Tobey, Victoria Samuels, Edward A. Dusal, and Thomas Wolfe, were, and now are, citizens of the United States and of the State of Nebraska, and inhabitants of, resident in, the Lincoln division of said United States District Court in the State of Nebraska, within the jurisdiction of this court.

IV.

That at all times hereinafter mentioned the defendants, B. R. Sloat, A. Pickens and E. Stockham, were, and now are, citizens of the United States and of the State of Nebraska, and inhabitants of, resident in, the Hastings division of said United States District Court in the State of Nebraska, within the jurisdiction of this court.

V.

That at all times hereinafter mentioned the defendant, Charles Figard, was, and now is, a citizen of the United States and of the State of Nebraska, and inhabitant of, resident in, the Grand Island division of said United States Dis-

trict Court in the State of Nebraska, within the jurisdiction of this court.

3

VI.

That at all times hereinafter mentioned, the defendant, S. S. Garvey, was, and now is, a citizen of the United States and of the State of Nebraska, and inhabitant of, resident in, the North Platte division of said United States District Court in the State of Nebraska, within the jurisdiction of this court.

VII.

That at all times hereinafter mentioned the defendants, Mrs. Nellie Goodwill, Grace E. Babcock, Mrs. J. L. Babcock, F. L. Babcock, F. O. Goodwill, F. J. Thatcher, Charles Howe, C. Arthur Howe, and F. W. Aishton, were, and now are, citizens of the United States and of the State of Illinois, and inhabitants of, and resident in, the Northern District of said United States District Court in the State of Illinois.

VIII.

That at all times hereinafter mentioned the defendant, F. A. Howard, was, and now is, a citizen of the United States and of the State of Missouri, and inhabitant of, and resident in, the Western District of said United States District Court in the State of Missouri.

IX.

That at all times hereinafter mentioned, the defendants, Theodore E. Grow and Agnes Johnson, were, and now are, citizens of the United States and of the State of Iowa, and inhabitants of, and resident in, the Southern District of said United States District Court in the State of Iowa.

X.

That at all times hereinafter mentioned the defendant, M. M. Betzner, was, and now is, a citizen of the United States and of the State of Iowa, and inhabitant of, and resident in, the Northern District of said United States District

4 Court in the State of Iowa.

XI.

That at all times hereinafter mentioned the defendant, C. J. Smyth, was, and now is, a citizen of the United States and of the District of Columbia, and inhabitant of, and resident in, the District of Columbia.

XII.

That at all times hereinafter mentioned the defendant, Bertha M. Bache, was, and now is, a citizen of the United States and the State of New York, and inhabitant of and resident in, the Southern District of said United States District Court of the State of New York.

XIII.

That at all times hereinafter mentioned the defendant, Mrs. A. H. Merchant, was, and now is, a citizen of the United States and of the State of Massachusetts, and inhabitant of, and resident in, the District of Massachusetts of said United States District Court in the State of Massachusetts.

XIV.

That at all times hereinafter mentioned the defendants, Mary Louise Jackson, J. B. Hill, J. Hervey Stout and Sarah Stout, were, and now are, citizens of the United States and of the State of New Jersey, and inhabitants of, and resident in, the District of New Jersey, of said United States District Court in the State of New Jersey.

XV.

That at all times hereinafter mentioned the defendant, Frank L. Wood was, and now is, a citizen of the United States and of the State of Wisconsin, and inhabitant of, and resident in, the Eastern District of said United States District Court in the State of Wisconsin.

XVI.

That at all times hereinafter mentioned the defendant,
5 George Loff, was, and now is, a citizen of the United States and of the State of Wyoming, and inhabitant of, and resident in, the District of Wyoming of said United States District Court in the State of Wyoming.

XVII.

That at all times hereinafter mentioned the defendants, Hattie B. Updike, Lawrence B. Updike, Marjorie D. Updike, Clara McCardel, and B. H. Updike, were and now are, citizens of the United States and of the State of California, and inhabitants of, and resident in, the Southern District of said United States District Court in the State of California.

XVIII.

That at all times hereinafter mentioned the defendant, Georgia E. Babcock, was, and now is, a citizen of the United States and of the State of Colorado, and inhabitant of, and resident in, the District of Colorado of said United States District Court in the State of Colorado.

XIX.

This is a suit in equity brought by the United States of a civil nature arising under a law of Congress providing for Internal Revenue and the collection thereof.

XX.

Updike Grain Company was duly organized as a corporation on or about August 19, 1899, under the laws of the State of Nebraska, with a total paid-up capital stock of $500,000.00. In or about the year 1906 the capital stock was increased to one million dollars, and in or about the year 1917 the capital stock of said corporation was increased to two million dollars. That the total paid-up capital stock of said corporation at the time of its dissolution as hereinafter stated, and prior thereto, was two million dollars.

That the said corporation had its principal office and
6 place of business at the City of Omaha, in the State of Nebraska, and from said August 19, 1899 until on or about August 28, 1917, which was the date of its formal dissolution, as hereinafter described, said corporation was engaged in the business of receiving grain on consignment, storing, buying and selling and [deal] in grain.

XXI.

The above named defendants were all stockholders of the said corporation at the date of said dissolution and on and immediately before that date owned and held the following shares of stock of said corporation:

Names	Number of Shares Held
Nelson B. Updike	5887
Metta E. Updike	4020
N. B. Updike, Jr.	400
Hazel Updike Reasoner	400
Edward Updike	2940
Robert B. Updike	892
Gorton Roth	400
Eva T. Roth	400

	Otis M. Smith	364
	Joy M. Hackler	500
	Ed. P. Smith	200
	George A. Roberts	200
	F. B. Johnson	132
	Thomas Wolfe	100
	Mary S. Updike	73
	Winnifred S. Updike	20
	Lucy Updike	4
	L. Claude Hamilton	76
	F. C. Bell	20
7	R. Earl Miller	10
	L. W. Schreiber	84
	Isabella Thorpe	20
	Jo. Hamilton	28
	Jos. P. McGrath	10
	A. P. Murtagh	8
	N. E. Murtagh	2
	A. Pickens	100
	Frank R. O'Neil	50
	Henry Figard	40
	Chas. Zinkey	20
	B. R. Sloat	20
	Alex T. Hart	20
	Charles Figard	20
	J. A. Dickinson	20
	E. Stockham	10
	S. S. Garvey	10
	A. S. Tobey	5
	Victoria Samuels	4
	Edward A. Dusal	2
	Frank L. Wood	100
	George Loff	20
	Bertha M. Bache	40
	Mrs. A. H. Merchant	18
	Mary Louise Jackson	2
	J. B. Hill	72
	J. Hervey Stout	30
	Sarah Stout	10
	Mrs. Nellie Goodwill	20
	Grace E. Babcock	4
	Mrs. J. L. Babcock	320
8	F. L. Babcock	162
	F. O. Goodwill	160
	F. J. Thatcher	100
	Charles Howe	400

C. Arthur Howe	175
F. W. Aishton	250
F. A. Howard	81
Theodore E. Grow	50
Agnes Johnson	21
M. M. Betzner	110
C. J. Smyth	50
Hattie B. Updike	20
Lawrence B. Updike	10
Marjorie D. Updike	10
Clara McCardel	4
B. H. Updike	230
Georgia E. Babcock	20

XXII.

That on October 3, 1917, the Congress of the United States duly enacted a revenue law entitled "An Act to provide revenue to defray war expenses, and for other purposes" (40 Statutes at Large 300), hereinafter referred to as the Revenue Act of October 3, 1917; that said Act was in part an amendment of the provisions of the Revenue Act of 1916. That Section 214, Title II of said Revenue Act of October 3, 1917, repealed Title II (Sections two hundred to two hundred and seven inclusive) of the Revenue Act of March 3, 1917; provided for a war excess profits tax, and provided further, that any amount paid under Title II of the Act of March 3, 1917 should be credited on any amount due as war excess profits tax under said Act of October 3, 1917. That said Revenue Act of October 3, 1917 expressly provided that
9 the rates of taxes provided therein should relate back to, and be effective from January 1, 1917.

That by virtue of the provisions of said Revenue Act of October 3, 1917, said Updike Grain Company was required to make and file with the Collector of Internal Revenue for the District of Nebraska a return for its income and war income tax and a return for its excess profits tax for the taxable period ending June 30, 1917, and to pay the income, war income and excess profits taxes imposed upon said Updike Grain Company by said Revenue Act of October 3, 1917. That said Updike Grain Company failed, neglected and refused to file said return for its income and war income tax or said return for its excess profits tax or to pay its income, war income or excess profits tax as required by said Revenue Act of October 3, 1917.

XXIII.

That said Updike Grain Company conducted its business on a fiscal year basis; that its fiscal year commenced August 1 and ended July 31; that it discontinued business June 30, 1917; that upon its failure to make its income, war income or excess profits tax returns or either or any of them, as above set forth, the Commissioner of Internal Revenue directed that a review and audit be made by the Revenue Department of the books, records and accounts of said Updike Grain Company in order to determine the income, war income and excess profits tax liability of said Updike Grain Company to the complainant, United States of America, under the provisions of said Revenue Act of October 3, 1917, for said taxable period ending June 30, 1917. That as a result of said review and audit of the books, records and accounts of said Updike Grain Company, which review and audit were made during the month of October, 1918, in accordance with the provisions and requirements of said Revenue Act of October 3, 1917, said Revenue Department computed, determined and found that there was due from said Updike Grain Company to the complainant, United States of America, on account of the income, war income and excess profits tax liability of said Updike Grain Company to said complainant, United States of America, for said taxable period ending June 30, 1917, the sum of $373,911.54. And complainant says that there is due and owing to it, the said complainant, from said Updike Grain Company on account of the matters and things hereinbefore set forth the sum of $373,911.54, together with interest thereon, as provided by law, from the time said amount became due, and that no part of said principal or interest has been paid. That said Updike Grain Company received net taxable income in the sum of $2,174,330.64 during the eleven months taxable period ending June 30, 1917.

XXIV.

That the income, war income and excess profits of said Updike Grain Company and said income, war income and excess profits tax liability thereon by said Revenue Act of October 3, 1917, were computed and determined as follows, namely:

Net income as shown by books and records		$2,174,330.64
Less excess profits tax		459,081.32
Amount taxable at 2%		$1,715,249.32
Net income as shown above		$2,174,330.64
Less:		
Dividends	$590,142.26	
Excess profits tax	459,081.32	1,049,223.58
Balance		$1,125,107.06
Amount taxable at 4% (6/11 of $1,125,107.06)		$ 613,694.75
Excess profits tax		$ 459,081.32
Tax at 2%		34,304.99
Tax at 4%		24,547.79
		$ 517,934.10
Total tax due under Revenue Act of October 3, 1917		
Credits:		
Amounts previously assessed and paid under prior Revenue Acts—		
Tax under Act of September 8, 1916,	$47,439.94	
Tax under Act of March 3, 1917 (Repealed)	96,582.62	144,022.56
Balance of taxes due under Act of October 3, 1917		$373,911.54

XXV.

Complainant is informed and believes and therefore avers the same to be the fact as set forth in this paragraph, that on August 27, 1917, a meeting of the stockholders of said Updike Grain Company was had, at which meeting there were present fifty-nine stockholders of said corporation representing either in person, or by proxy, 19,746 shares of the capital stock of the said corporation,—the total number of shares issued and outstanding being 20,000 shares. At said meeting a resolution was duly adopted by stockholders representing more than two-thirds of the outstanding stock of the said corporation authorizing the officers and directors of said corporation to take such steps as would result in the voluntary liquidation of the corporation, and the transfer of its assets on such terms as would enable the corporation to retire all of its outstanding stock at par. The said resolution further provided for the surrender of all of the outstanding stock of the corporation upon the payment of each stockholder in cash the par value of his stock so surrendered. The said resolution also ratified and approved the action of the Board of Directors of said corporation taken and had on August 18, 1917, wherein the Directors resolved to voluntarily liquidate said corporation and distribute its assets among its stockholders. By said resolution the officers of said Up-

dike Grain Company were authorized and directed to execute the necessary Certificate of Dissolution and to file the same in the appropriate office. Said Certificate of Dis-
12 solution, after having been duly sworn to by N. B. Updike, President, and Gorton Roth, Secretary, on August 28, 1917, was duly filed in the office of the Secretary of State of the State of Nebraska on August 30, 1917, and was therein duly recorded in said office in Book 31, Miscellaneous Incorporations, at Page 610.

XXVI.

That immediately prior to said corporate dissolution of said Updike Grain Company, as the complainant is informed and believes, and therefore avers to be the fact, the said corporation had on hand cash and other assets aggregating two million dollars, or thereabouts, and said assets were forthwith and prior to the date of its formal dissolution by said corporation distributed amongst its stockholders, the above-named defendants, ratably according to their stockholdings of its shares of stock; that is to say each and every defendant received in cash or its equivalent an amount equal to $100.00 for each and every share of stock owned and held by him or her in said corporation. By reason of the said dissolution and distribution of all the assets and the property of the said Updike Grain Company as aforesaid to and amongst its stockholders as hereinbefore set forth, said corporation was left without money, assets or property of any kind with which to pay the said taxes due and owing to the United States, hereinbefore specifically set out, and the defendants, and each and every one of them received, as stockholders of said corporation, the entire money, assets and property of said Updike Grain Company as distributees charged with a trust in favor of the United States to the extent of the said taxes due and unpaid by it as hereinbefore set forth.

XXVII.

That the complainant has no plain, adequate or complete remedy at law against said Updike Grain Company or the defendants herein and therefore brings this suit in equity.

13 XXVIII.

That the Commissioner of Internal Revenue and the Attorney General of the United States authorizes and sanctions these proceedings.

XXIX.

Wherefore, in consideration of the facts herein [states] complainant, being without a plain, adequate, and complete remedy at law, comes before this court and prays:

1. That this Honorable Court order, adjudge, and decree that the aforesaid corporate assets of said Updike Grain Company so distributed to the defendants constitute a trust fund for the payment of said taxes due and owing by the said corporation to the United States, and that the said defendants shall account to this court for the aforesaid trust property, and that the fund aforesaid be applied to the payment of said taxes due and owing to the complainant.

2. That this Honorable Court order, adjudge and decree that the defendants be accountable to the complainant for the aforesaid taxes to the extent of the amount distributed to and received by them and each of them from the assets of the said corporation, and that each of the said defendants be ordered to pay to the complainant to the extent of the amounts distributed to and received by them from the assets of said Updike Grain Company, the amounts hereinabove shown to be due to the complainant for income, war income and excess profits taxes, together with interest at the legal rate from the date when the aforesaid taxes became due.

3. That complainant have such other, and further, and general relief as is just and equitable as well as a decree for costs.

And may it please the court to grant unto the complainant a writ of subpoena to the United States of America
14 issued out of and under the seal of this Honorable Court directed to the above-named defendants and commanding them on a day certain and under certain penalties therein expressed, personally to appear before this Honorable Court then and there to answer all and singularly the premises, answer under oath being expressly waived, and to stand to and perform and abide by such orders, directions and decrees as may be made against them in the premises, and complainant will ever pray.

JAMES C. KINSLER,
United States Attorney for the District of Nebraska.

Endorsed: Filed Apr. 28, 1927. R. C. Hoyt, Clerk.

15 Amendment to Paragraph XIX of Amended Bill of Complaint.

United States District Court for the District of Nebraska, Omaha Division.

United States of America, Complainant,
Number 853 vs. Equity.
Nelson B. Updike, et al., Defendants.

Now comes the complainant, and with leave of Court, amends Paragraph XIX of Complainant's Amended Bill of Complaint by striking out the following words, namely:" arising under a law of Congress providing for Internal Revenue and the collection thereof", so that said Paragraph XIX, as now amended, will read "This is a suit in equity brought by the United States of a civil nature."

JAMES C. KINSLER,
United States Attorney for the District of Nebraska.

Endorsed: Filed Mar. 28, 1928, R. C. Hoyt, Clerk.

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16 Answer of Ed. P. Smith.

Comes now Ed. P. Smith, one of the defendants herein, and for a separate answer to the amended bill of complaint filed herein states:

I.

For the purpose of this answer, this defendant admits the allegations of paragraphs 1 to 20 inclusive of the amended bill of complaint, and also admits the allegations of paragraph 25 thereof.

II.

This defendant has neither knowledge nor information sufficient to enable him to form a belief as to the truth of the allegations of fact contained in said amended bill of complaint not hereinbefore expressly admitted to be true, and therefore denies the same and each thereof.

III.

He alleges that many of the said allegations of fact in said amended bill of complaint not herein expressly admitted to be true are based wholly upon official records in the custody and control of the Commissioner of Internal Revenue at Washington, D. C. or of the Collector of Internal Revenue at

Omaha, Nebraska. This defendant has applied to each of said officers for copies of such of said records as are in their possession respectively, has offered to pay the charges and cost thereof, but his request has been refused. As a re-
17 sult of said refusal, this defendant cannot attach to this answer copies of said records and proceedings hereinafter referred to, nor state the exact contents thereof, and is forced to base his allegations relative thereto upon information and belief.

First Defense.

For his first defense to the amended bill of [complainant], this defendant alleges, that at all times during the year 1917, and during the corporate existence of the Updike Grain Company, Nelson B. Updike was its president, Elmer A. Cope was its treasurer and Gorton Roth was its secretary; that the Updike Grain Company was a corporation, organized under the laws of the State of Nebraska, operating on a fiscal year basis, its fiscal year ending July 31st of each year; that immediately after the close of its fiscal year in 1917, said corporation duly filed in the manner provided by law, and with the proper officials of the United States Government, its report of its net earnings for the fiscal year ending July 31, 1917, showing net earnings during said period of $2,371,-997.05, and paid its tax then due thereon in the sum of approximately $143,000.00; that said Updike Grain Company discontinued business on the 31st day of July, 1917, and on or about the 18th day of August, 1917, said corporation was dissolved in the manner provided by the laws of the State of Nebraska, its assets in their entirety were transferred to the said Nelson B. Updike, who in consideration therefor, agreed to, and did provide sufficient cash, or its equivalent to pay to each stockholder in said corporation, a sum equal to the par value of the stock so held by such stockholder in said corporation.

This defendant alleges, that after the enactment by the Congress of the United States of the Revenue Act of 1917 referred to in paragraph 22 of the amended bill of complaint herein, and to-wit: on or about the 1st day of March
18 1918, demand was made of the former President and Secretary of the Updike Grain Company that an additional and further return be filed in the name of the Updike Grain Company showing the entire net income of said Grain Company for the year 1917. This defendant is advised and states the fact to be, that because of the dissolution of said

corporation as hereinbefore referred to, and for reasons which the said Nelson B. Updike and Gorton Roth deemed good and sufficient, and acting in good faith, with no intent to deceive or evade the payment of any just or legal assessment of taxes then assessed, or that might after be assessed against the said Updike Grain Company, further or additional return of the net earnings of said Updike Grain Company for the year 1917 was not made.

This defendant is advised and alleges the fact to be, that thereafter, to-wit: in October 1918, duly constituted and legal representatives of the Internal Revenue Department of the Complainant herein, but whose names this defendant is unable to state because of the refusal of the Commissioner of Internal Revenue to give to this defendant the copies of said records hereinbefore referred to, but who he alleges were duly authorized representatives of said Internal Revenue Department and Deputy Collectors of Internal Revenue for the State of Nebraska duly constituted and appointed as such in the manner provided by law, made investigation and audit of the net income of the Updike Grain Company for the year 1917; that after making said audit and investigation and reducing the same to writing, the same was forwarded to the Commissioner of Internal Revenue, together with an amended return showing the net income of the Updike Grain Company for the year 1917 to be approximately $200,000.00 less than had theretofore been reported by the said Updike Grain Company.

19 This defendant is advised and alleges the fact to be that said audit, report and amended return as aforesaid so made by the said representative of said Department were received by the Commissioner of Internal Revenue at Washington, were in all respects by him ratified confirmed and approved, were accepted and filed as an amended return of the income of the Updike Grain Company, was then signed, endorsed and approved as such amended return made by the said Commissioner of Internal Revenue on information obtained by him as provided by law, and thereafter, to-wit: on or about the 15th day of January, 1920 said Commissioner of Internal Revenue on the information then before him obtained in the manner provided by law found and determined that there was due to the Complainant herein, from the said Updike Grain Company on account of war income and excess profits for the year 1917, a certain definite sum, the amount of which this defendant cannot state because of his inability to secure copies of said records.

He alleges, that after making said return, and from the information thus obtained as provided by law, the said Commissioner of Internal Revenue in January, 1920, made and entered of record in his office at Washington, D. C., an assessment against the Updike Grain Company, as, and for war income and excess profits taxes for the year 1917 in a certain definite sum and amount, which amount it is impossible for this defendant to state because of his inability to get a copy of said record, but which amount this defendant alleges represented the balance then claimed to be due from the Updike Grain Company as found, determined and assessed by said Commissioner of Internal Revenue on account of war income and excess profits taxes due from the Updike Grain Company on account of net profits, war income and excess profits taxes for the year 1917. He alleges that immediately thereafter, a notice of said assessment and a certified copy thereof showing the amount so assessed against the Updike Grain Company was forwarded to the Collector of Internal Revenue at Omaha, Nebraska for collection,

20 This defendant alleges, that the additional and amended return of the net income of the Updike Grain Company hereinbefore referred to, showing the net income for the purpose of determining the war income and excess profits for assessment purposes for the year 1917 required and due under the rules and regulations of the Department of Internal Revenue, if any such further return was required of the Updike Grain Company, was due from it not later than March 1918, and this defendant shows to the court that no suit or proceedings for the collection of any tax on account of war income or excess profits for the year 1917 was begun or brought or commenced against the said Updike Grain Company or any of its stockholders, or against this defendant, until after the expiration of five years after the date said return, if any, was due, and by reason of such delay, this action is barred by the Statute of Limitations in such case provided.

Second Defense.

For further defense, this defendant alleges that said audit and amended return referred to in paragraph 23 of the amended bill of complaint was made by a duly constituted and appointed representative of the Department of Internal Revenue of the Complainant herein, was made by Deputy Collector of Internal Revenue for the District of Nebraska, duly and legally appointed as such as this defendant is in-

formed and believes, and which he upon such information and belief states to be the fact; such audit and amended return upon being received by the Department of Internal Revenue at Washington was by the Commissioner of Internal Revenue, ratified, confirmed and approved, accepted, signed and treated by said Commissioner of Internal Revenue as an amended return for the Updike Grain Company for the year 1917 in all respects made as required by law, and this defendant alleges, that no suit or proceedings for the collection of any tax was begun against the said Updike Grain Company, or any of its stockholders, or against this defendant until after the expiration of more than five years after the date said amended return was made, received, accepted, ratified, confirmed, approved and acted upon by the Department of Internal Revenue at Washington, D. C., and by reason of such delay, this action is barred by the Statutes of Limitations in such made and provided.

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Third Defense.

For further defense this defendant alleges, that in January 1920, the Commissioner of Internal Revenue at Washington, D. C. on returns and amended returns then before him, and from examination made by him and evidence obtained by him in the manner provided by law, assessed against the Updike Grain Company the war income and excess profits taxes for the year 1917 based on the full net earnings of the Updike Grain Company for the year 1917, such an assessment being in addition to the amount of taxes theretofore paid by the Updike Grain Company in the sum of approximately $143,000.00; this defendant cannot state the exact amount which was then assessed by said Commissioner of Internal Revenue against the Updike Grain Company because of his inability to secure copies of said records as hereinbefore set forth, but he alleges said assessment was for the period, and for the war income and excess profits so made and received by the Updike Grain Company, and which form the basis for the claim set forth in the amended bill of complaint filed herein.

He alleges, that no suit for the recovery of the amount thereof was commenced against the Updike Grain Company or any of its stockholders, or against this defendant within six years from the date of said assessment, and by reason of such delay and lapse of time this action became, and is barred by the Statute of Limitations in such case made and provided. The claim against the Updike Grain Company, its stockholders and this defendant has been ex-

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guished and the prosecution of this action forbidden by of Congress.

Wherefore, having fully answered this defendant prays the gment of this court that the Complainant's amended bill complaint be dismissed, and that this defendant recover costs herein expended.

ED. P. SMITH,
By Smith, Schall,
Howell & Sheehan,
His Attorneys.

ndorsed: Filed Jun. 8, 1927, R. C. Hoyt, Clerk.

Separate Answer of George A. Roberts.

Comes now George A. Roberts, one of the defendants ein, and for separate answer to the amended bill of com- nt filed herein, states:

For the purpose of this answer, this defendant admits allegations of paragraphs 1 to 20 inclusive of the amend- ill of complaint, and also admits the allegation of para- h 25 thereof.

This defendant has neither knowledge nor information cient to enable him to form a belief as to the truth of the gations of fact contained in said amended bill of com- nt not hereinbefore expressly admitted to be true, and efore denies each and every allegation therein contained pt as heretofore admitted to be true.

This defendant further alleges that many of said alle- ons of fact in said amended bill of complaint not herein essly admitted to be true are based wholly upon the offi- records in the custody and control of the Commissioner nternal Revenue at Washington, D. C. or of the Collector nternal Revenue at Omaha, Nebraska, and that this de- ant cannot attach to this answer copies of said records proceedings hereinafter referred to, nor state the exact ents thereof and is forced to base his allegations rela- thereto upon information and belief.

First Defense.

For the first defense to the amended bill of complaint this defendant alleges that at all times during the year

1917 and during the corporate existence of the Updike Grain Company, Nelson B. Updike was its president, Elmer A. Cope was its treasurer and Gorton Roth was its secretary; that the Updike Grain Company was a corporation organized under the laws of the State of Nebraska, operating on a fiscal year basis, its fiscal year ending July 31st of each year; that immediately after the close of its fiscal year in 1917 said corporation duly filed in the manner provided by law and with the proper officials of the United States Government, its report of its net earnings for the fiscal year ending July 31, 1917, showing net earnings during said period of $2,371,997.05 and paid its tax then due thereon in the sum of approximately $143,000.00; that said Updike Grain Company discontinued business on the 31st day of July, 1917, and on or about the 18th day of August, 1917, said corporation was dissolved in the manner provided by the laws of the State of Nebraska, its assets in their entirety were transferred to the said Nelson B. Updike, who in consideration thereof, agreed to and did provide sufficient cash or its equivalent to pay to each stockholder in said corporation a sum equal to the par value of the stock so held by said stockholder in said corporation.

This defendant alleges that after the enactment by the Congress of the United States of the Revenue Act of 1917 referred to in paragraph 22 of the amended bill of complaint herein, and to-wit: on or about the 1st day of March, 1918 demand was made of the former President and Secretary of the Updike Grain Company that an additional and further return be filed in the name of the Updike Grain Company showing the entire net income of said Updike Grain Company for the year 1917. This defendant is advised and states the fact to be that because of the dissolution of said corporation as hereinbefore referred to, and for reasons which the said Nelson B. Updike and Gorton Roth deemed good
25 and sufficient, and acting in good faith and with no intent to deceive or evade the payment of any just or legal assessment of taxes then assessed, or that might after be assessed against the said Updike Grain Company, further or additional return of the net earnings of said Updike Grain Company for the year 1917 was not made.

This defendant is advised and alleges the fact to be that thereafter, to-wit: in October, 1918, duly constituted and legal representatives of the Internal Revenue Department of the Complainant herein whose names this defendant is unable to state, but who he alleges were duly authorized repre-

sentatives of said Internal Revenue Department and Deputy Collectors of Internal Revenue for the State of Nebraska duly constituted and appointed as such in the manner provided by law made investigation and audit of the net income of the Updike Grain Company for the year 1917; that after making said audit and investigation and reducing the same to writing, the same was forwarded to the Commissioner of Internal Revenue together with an amended return showing the net income of the Updike Grain Company for the year 1917 to be approximately $200,000.00 less than had heretofore been reported by the said Updike Grain Company.

This defendant is advised and alleges the fact to be that said audit, report and amended return as aforesaid so made by the said representatives of the said department were received by the Commissioner of Internal Revenue at Washington were in all respects by him ratified, confirmed and approved, were accepted and filed as an amended return of the income of the Updike Grain Company, were then signed, endorsed and approved as such amended return made by said Commissioner of Internal Revenue on information obtained by him as provided by law, and thereafter, to-wit: on or about the 15th day of January, 1920, said Commissioner of
16 Internal Revenue on the information then before him obtained in the manner provided by law, found and determined that there was due to the Complainant herein from the said Updike Grain Company an amount of war income and excess profits for the year 1917, a certain definite sum, the amount of which this defendant can not state because of his lack of information.

He alleges that after making said return and from the information thus obtained as provided by law, the said Commissioner of Internal Revenue in January, 1920, made and entered of record in his office at Washington, D. C. an assessment against the Updike Grain Company, as, and for war income and excess profits taxes for the year 1917 in a certain definite sum and amount, which amount this defendant is unable to state, but which amount this defendant alleges represented the balance then claimed to be due from the Updike Grain Company as found, determined and assessed by said Commissioner of Internal Revenue on account of war income and excess profits taxes due from the Updike Grain Company on account of net profits, war income and excess profits for the year 1917. He alleges that immediately thereafter a notice of said assessment and a certified copy thereof showing the amount so assessed against the Updike Grain Company

was forwarded to the Commissioner of Internal Revenue at Omaha, Nebraska, for collection.

This defendant alleges that the additional and amended return of the net income of the Updike Grain Company hereinbefore referred to showing the net income for the purpose of determining the war income and excess profits for assessment purposes for the year 1917 required and due under the rules and regulations of the Department of Internal Revenue if any such further return was required of the Updike Grain Company was due from it not later than March, 1918, and this
27 defendant shows to the Court that no suit or proceedings for the collection of any tax on account of war income or excess profits for the year 1917 was begun or brought or commenced against said Updike Grain Company, or any of its stockholders or against this defendant until after the expiration of five years after the date said return, if any, was due and by reason of such delay this action is barred by the Statute of Limitations, in such case provided.

Second Defense.

For further defense, this defendant alleges that said audit and amended return referred to in paragraph 23 of the amended bill of complaint was made by a duly constituted and appointed representative of the Department of Internal Revenue of the Complainant herein, was made by Deputy Collector of Internal Revenue for the District of Nebraska duly and legally appointed as such as this defendant is informed and believes, and which he upon such information and belief states to be the fact. Such audit and amended return upon being received by the Commissioner of Internal Revenue, ratified, confirmed and approved, accepted, signed and treated by said Commissioner of Internal Revenue as an amended return for the Updike Grain Company for the year 1917 in all respects made as required by law, and this defendant alleges that no suit or proceedings for the collection of any tax was begun against said Updike Grain Company or any of its stockholders or against this defendant until after the expiration of more than five years after the date said amended return was made, received, accepted, ratified, confirmed, approved and acted upon by the Department of Internal Revenue at Washington, D. C. and by reason of such delay this action is barred by the Statute of Limitations in such case made and provided.

Third Defense.

For further defense this defendant alleges that in January, 1920, the Commissioner of Internal Revenue at Washington, D. C. on returns and amended returns hen before him and from examination made by him and evidence obtained by him in the manner provided by law, assessed against the Updike Grain Company the war income nd excess profits taxes for the year 1917 based on the full et earnings of the Updike Grain Company for the year 917, such an assessment being in addition to the amount of axes heretofore paid by the Updike Grain Company in the um of approximately $143,000.00; this defendant can not ate the exact amount which was then assessed against the pdike Grain Company because of his inability to secure ich information, but he alleges said assessment was for the eriod and for the war income and excess profits so made and eceived by the Updike Grain Company and which formed e basis for the claim set forth in the amended bill of complaint filed herein.

He alleges, that no suit for the recovery of the amount ereof was commenced against the Updike Grain Company any of its stockholders or against this defendant within six ars from the date of said assessment and by reason of such lay and lapse of time this action began and is barred by e Statute of Limitations in such case made and provided. he claim against the Updike Grain Company, its stockholds and this defendant has been extinguished and prosecution this action forbidden by the Act of Congress.

Wherefore having fully answered, this defendant prays the dgment of this court that the Complainant's amended bill complaint be dismissed, and that this defendant recover s costs herein expended.

GEORGE A. ROBERTS, Defendant,
By Warren H. Howard, His Attorney.

Endorsed: Filed Jun. 13, 1927. R. C. Hoyt, Clerk.

(Answer of Nelson B. Updike, et al.)

Come now Nelson B. Updike, Metta E. Updike, N. B. dike, Jr., Hazel Updike Reasoner, Edward Updike, Rob- B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Up- e, L. Claude Hamilton, F. C. Bell, Pearl Miller, Jo Ham- n, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas.

Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart and Jos. P. McGrath, and for answer to the amended bill of complaint of the complainant filed herein, state:

1. Admit the allegations of paragraphs I to XVIII inclusive.

2. Answering paragraph XIX of said amended bill of complaint, defendants admit this is a suit in equity of a civil nature, but deny that it arises under a law of Congress. Defendants are without knowledge as to whether this suit is brought by the United States or by the authority of any duly authorized officers of the United States.

3. Answering paragraph XX of said amended bill of complaint, defendants admit that the Updike Grain Company was duly organized as a corporation, under the laws of
30 the State of Nebraska, in August, 1899, the exact date being August 21st, 1899; that in or about the year 1906, the capital stock was increased to $1,000,000.00, and in or about the year 1917 the capital stock was increased to $2,000,000.00; that the total paid up capital stock of said corporation, at the time of its dissolution, as hereinafter stated, and since April 30th, 1917, was $2,000,000.00; admit that said corporation had in its principal office and place of business at Omaha, Nebraska, and from August 21st, 1899, until on or about August 28th, 1917, which was the date of its formal dissolution, said corporation was engaged in the business of receiving grain on consignment, storing, buying, selling and dealing in grain. Further answering said paragraph, defendants allege that the Updike Grain Company was duly organized with a total paid up capital stock of $110,000.00, which on July 1st, 1901, was duly increased to $500,000.00, and on December 9th, 1905, was duly increased to $1,000,000.00, and on April 30th, 1917, was duly increased to $2,000,000.00.

4. Admit the allegations of paragraph XXI of said amended bill of complaint.

5. Answering paragraph XXII of said amended bill of complaint, defendants admit that on October 3rd, 1917, the Congress of the United States enacted a Revenue Law entitled as therein described, which repealed Title II of the Revenue Act of March 3d, 1917, providing for a war excess profits tax, and providing further that any amount paid under Title II of the Act of March 3d, 1917, should be cred-

ited on any amount due as war excess profits tax under said Act of October 3d, 1917, but deny that by virtue of the provisions of said Revenue Act, said Updike Grain Company was required to make and file with the Commissioner of Internal Revenue, for the District of Nebraska, returns for its income, war income tax, and excess profits tax for the
31 taxable period ended June 30th, 1917, and to pay the income, war income and excess profits taxes, herein claimed to have been imposed upon said Updike Grain Company, by said Revenue Act of October 3d, 1917; deny that said Updike Grain Company failed, neglected or refused to file returns for its income, war income, or excess profits taxes for the year 1917, or any part thereof, or to pay the income, war income or excess profits taxes legally due from said Updike Grain Company for the year 1917.

6. Answering paragraph XXIII of said amended bill of Complaint, admit that said Updike Grain Company conducted its business on a fiscal year basis; admit that the Commissioner of Internal Revenue directed that a review and audit be made by the Revenue Department, of the books, records and accounts of said Updike Grain Company, to determine any tax liability under the Revenue Act of October 3d, 1917, for the fiscal year ended June 30, 1917, and that said review and audit of the books, records and accounts of said Updike Grain Company were made during the month of October, 1918, and that thereafter the Revenue Department computed, determined and found that there was due from said Updike Grain Company to the complainant, on account of an alleged income, war income and excess profits tax liability of said Updike Grain Company, for said fiscal year ended June 30th, 1917, the sum of Three Hundred Seventy-Three Thousand, Nine Hundred Eleven and Fifty-Four One-Hundredths ($373,911.54) Dollars; admit that the fiscal year commenced August 1st, 1916, but deny that same ended on July 31st, 1917, and in that behalf allege that the fiscal year of said Updike Grain Company ended on June 30th, 1917; deny that the Updike Grain Company discontinued business June 30th, 1917, and in that behalf allege that the said Updike Grain Company continued in
32 business after the ending of its fiscal year on June 30th, 1917, until the date of its dissolution, on or about August 28th, 1917; deny that said Updike Grain Company failed to make its income, war income, or excess profits tax returns, or either or any of them, of its net income and earnings for the year 1917, or for the fiscal year ended June 30th, 1917. Further answering said paragraph XXIII, and other

allegations in the said amended bill of complaint, relating thereto, these defendants allege that the facts respecting the returns filed by said Updike Grain Company and the reviews and audits made by the Department or Bureau of Internal Revenue, and any returns that might have been made by any collector or deputy collector of Internal Revenue, or the Commissioner of Internal Revenue, are matters of official record in the custody and control of the Commissioner of Internal Revenue at Washington, D. C.; that some of these defendants personally, and all of these defendants by and through their attorney, have requested upon a number of occasions, both in writing and orally, of the Commissioner of Internal Revenue, the general counsel of the Bureau of Internal Revenue, by and through the assistant general counsel of the Bureau of Internal Revenue, and other attorneys for the Bureau of Internal Revenue, and of the United States District Attorney having charge of this case, copies of such of said records as are in their possession, and an opportunity to examine the originals of said documents, and have offered to pay the charges and cost of any copies of said documents, which requests have been refused and denied by each and all of said parties, until June 15, 1927, when the United States District Attorney for Nebraska, exhibited to one of the attorneys for defendants, what purported to be photostat copies of an income tax return of said Updike Grain Company dated July 24th, 1917, filed July 25th, 1917, an excess profits tax return of said company dated August 29th, 1917, filed August
33 30th, 1917, an amended excess profits tax return of said company dated September 27th, 1917, filed September 28th, 1917, return form 1031, attached to which is a certificate dated March 26th, 1918, income tax return dated January 25th, 1918, filed January 29th, 1918, copy of a letter dated October 26th, 1918, to Commissioner of Internal Revenue from John J. Gillin, Revenue Agent in charge at Omaha, Nebraska, transmitting report of L. C. Smith, of date October 25th, 1918, with exhibits and forms 1031 and 1103 attached thereto (minus forms 7894 mentioned therein); also, letter of date June 30th, 1919, to said Commissioner from said Revenue Agent in charge, transmitting transmittal report of L. C. Smith, of date June 30th, 1919; that as a result of said refusals, these defendants cannot adequately answer the amended bill of complaint, filed herein, nor exactly state the facts respecting said matters, but defendants are informed and believe, and therefore state the facts to be, that in the month of July, 1917, said Updike Grain Company duly executed, made and filed with com-

plainant and the collector of Internal Revenue at Omaha, Nebraska, its return of its net income, and earnings for the eleven-month period ending June 30th, 1917, being its fiscal year as determined and accepted by the collector of Internal Revenue at Omaha, Nebraska, and at the same time paid the full amount of income taxes then due thereon; that on August 29th, 1917, said Updike Grain Company duly executed, made and filed with complainant and the collector of Internal Revenue at Omaha, Nebraska, its return of net income and earnings for the eleven-month period ending June 30th, 1917, and at the same time paid the full amount of excess profits tax then due thereon; that thereafter, and on or about September 27th, 1917, said Updike Grain Company duly executed, made and filed with complainant and
34 the collector of Internal Revenue at Omaha, Nebraska, an amended excess profits tax return for the eleven-month period ending June 30th, 1917, and at the same time paid the tax then due thereon; that on or about August 28th, 1917, the said Updike Grain Company was duly and legally dissolved as a corporation, pursuant to the laws of the State of Nebraska, and at the same time distributed its entire assets among its stockholders, in proportion to their stock interests in said corporation, as same existed at the time of said dissolution; that on or about January 25th, 1918, said Updike Grain Company duly made and filed with the complainant and the collector of Internal Revenue at Omaha, Nebraska, its return of its net income and earnings for the period July 1st, 1917, to the date of its dissolution on or about August 28th, 1917, showing no net earnings for said period and accompanying said return with a certificate of dissolution, showing dissolution of the taxpayer on or about August 28th, 1917; that the returns filed by said Updike Grain Company, as aforesaid, accurately set forth specifically the gross amount of income from all separate sources of said Updike Grain Company for the year 1917 and for the eleven-month period ending June 30th, 1917, and the aggregate items of allowances authorized by law, and the total and entire net income and earnings of said Updike Grain Company for the eleven-month period ending June 30th, 1917, for the periods January 1st, 1917, to June 30th, 1917, and July 1st, 1917, to the date of dissolution of said Updike Grain Company on or about August 28th, 1917, and all other facts, data and information appropriate and necessary to determine the correctness of the net income returned and to carry out any applicable provisions of the Revenue Act of October 3d, 1917, and to assess any taxes that might have accrued against said Updike Grain Com-

pany under said Revenue Act of October 3d, 1917; that thereafter and in October, 1918, one L. C. Smith and other duly authorized representatives of the Bureau of In-
35 ternal Revenue, the Secretary of the Treasury of the United States, said Commissioner of Internal Revenue, and the Collector of Internal Revenue at Omaha, Nebraska, but whose names these defendants are unable to state, because of the refusals of the Commissioner of Internal Revenue and other officers, having charge and control of the official records relating to said matters, to give to these defendants copies or an inspection of said records, except as hereinbefore described, made an investigation, review and audit of the returns aforesaid and of the net income and earnings of said Updike Grain Company, for the year 1917; that after making said investigation, review and audit of the books, records, income and earnings of said Updike Grain Company for the year 1917, and of the returns made by said Updike Grain Company as aforesaid, said L. C. Smith and the other representatives, as aforesaid, on October 25th, 1918, duly made, subscribed and forwarded to the Commissioner of Internal Revenue at Washington, D. C., a report of said investigation, review and audit, and an amended return showing and setting forth specifically the gross amount of income from all separate sources of said Updike Grain Company for the year 1917, and the aggregate items of allowances authorized by law, and the net income and earnings of said Updike Grain Company for the year 1917; that said investigation, audit and report and amended return so made and forwarded, as aforesaid, with the returns of said Updike Grain Company, as aforesaid, were in all respects ratified, confirmed, accepted, approved and filed by said Commissioner of Internal Revenue as the returns and amended return of said Updike Grain Company, of its income and earnings for the eleven-month period ending June 30th, 1917, and for the year 1917; that said investigation, review, audit, report and amended return were at said time signed, subscribed, endorsed, accepted, adopted, filed and approved as the returns and amended return of
36 said Updike Grain Company for the year 1917 and for the eleven-month period ended June 30th, 1917, by the Commissioner of Internal Revenue and by a collector or deputy collector of Internal Revenue; that thereupon and in or about the month of October, 1918, said Commissioner of Internal Revenue computed, determined and found from said returns made and filed by said Updike Grain Company, and said investigation, review, audit, report and amended return, that there was due from said Up-

dike Grain Company to complainant, on account of the income, war income and excess profits tax liability of said Updike Grain Company, for the year 1917, and for the eleven-month period ended June 30th, 1917, the additional sum of Three Hundred Seventy-Three Thousand, Nine Hundred Eleven and Fifty-Four One-Hundredths ($373,911.54) Dollars, the amount sought to be recovered in this action, and thereupon assessed a tax against said Updike Grain Company in said amount; that thereafter said assessment of additional tax, in the amount of Three Hundred Seventy-Three Thousand, Nine Hundred Eleven and Fifty-Four One-Hundredths ($373,911.54) Dollars, was [formerly] endorsed upon the return duly executed and made by said Updike Grain Company, July 24th, 1917, and duly filed with the complainant and the collector of Internal Revenue at Omaha, Nebraska, on July 25th, 1917, by said Commissioner of Internal Revenue; that thereafter in January, 1920, said Commissioner of Internal Revenue formally and in the manner required by law, entered upon the assessment roll of said Commissioner of Internal Revenue and the Bureau of Internal Revenue, said assessment; that thereupon and in January, 1920, said Commissioner of Internal Revenue certified said assessment to the collector of Internal Revenue at Omaha, Nebraska, in the manner required by law, and said collector thereupon made demand upon said Updike Grain Company and the officers thereof, for the payment of said ad-
37 ditional tax, as thus determined and assessed, and ever since said date has upon numerous occasions been continuously asserting the validity of said assessment, pursuant to directions of the complainant and said Commissioner of Internal Revenue.

7. Answering paragraph XXIV of said amended bill of complaint, defendants admit that said taxes were computed and determined by the Commissioner of Internal Revenue as set forth in said paragraph, but in that behalf these defendants allege that said computation is erroneous in this, that in the determination of said tax, only eleven-twelfths of the invested capital and specific exemption, allowed said Updike Grain Company under the laws then existing, was used as a basis for computing said tax, whereas the full invested capital and the full specific exemption should have been used; that there was an additional error in the computation of said tax, in this, that in computing the 4% additional tax under the Revenue Act of October 3d, 1917, the excess profits tax of said Updike Grain Company was deducted from the net earnings of said corporation, for the

entire fiscal year period, August 1st, 1916, to June 30th, 1917, whereas said excess profits tax should have been deducted from the net earnings for the period January 1st, 1917, to June 30th, 1917. That the full invested capital of the Updike Grain Company for the period covered in said computation as determined by said review and audit, was $1,018,626.45; that the net income and earnings of said Updike Grain Company for the period August 1st, 1916, to June 30, 1917, exclusive of dividends received, as so determined, were $1,584,188.38, and the net income and earnings of said corporation for the period January 1st, 1917, to June 30th, 1917, exclusive of dividends received, as so determined, were $410,419.64. That as a result of said erroneous computation,
38 the amount of tax claimed in said amended bill of complaint is overstated, and in excess of any sum that might be due, under any laws existing at the time thereof, based upon the aforesaid figures, in the sum and amount of $13,421.25. That in the event it shall be held that said Updike Grain Company was liable for any additional taxes for the year 1917, defendants are informed and believe, and therefore state the facts to be, that said computation is further erroneous in this, that owing to abnormal conditions affecting the capital and income of said Updike Grain Company, the tax computed, determined, found and assessed thereon by said Revenue Department and Commissioner of Internal Revenue, worked and continues to work upon said corporation an exceptional hardship evidenced by gross disproportion between the tax, as thus computed, and taxes computed against other representative corporations, for the same period, whose invested capital can be satisfactorily determined, and which corporations were, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted, and capital employed, the amount and rate of war profits or excess profits, and all other or relevant facts and circumstances. That this is not a case in which the tax is high, merely because the corporation earned within the taxable year a high rate of profits, upon a nominal invested capital, nor in which fifty per centum or more of the gross income of the corporation, for the taxable year, computed as required by law, consisted of gains, profits, commissions or other income derived on a cost-plus basis, from a Government contract or contracts made between April 6, 1917, and November 11, 1917, both dates inclusive. In the event it shall be determined that there was a tax due and owing from said Updike Grain Company, under the Revenue Act of October 3d, 1917,

then these defendants are entitled to a special assessment of said tax under the provisions of Section 210 of the
39 Revenue Act of October 3d, 1917, Sections 327 and 328 of the Revenue Act of 1918, and such rules and regulations of the Bureau of Internal Revenue and the Commissioner of Internal Revenue, as were and are applicable thereto.

8. Answering paragraph XXV of said amended bill of complaint, defendants admit the allegations therein set forth.

9. Answering paragraph XXVI of said amended bill of complaint, defendants admit all of the allegations in said paragraph, except that there were any taxes due and owing to the United States, as set out in said amended bill of complaint, and that these defendants, as stockholders of said corporation, received the money, assets and property of said Updike Grain Company, as distributees charged with a trust in favor of the United States to the extent of taxes claimed by the complainant, or any other taxes, which allegations these defendants deny.

10. Answering paragraph XXVIII of said amended bill of complaint, defendants state that they are without knowledge as to the allegations therein contained.

11. Defendants deny each and every allegation in said amended bill of complaint contained, not in this answer specifically admitted to be true.

12. That neither the said Updike Grain Company, nor any of the defendants herein, were at any time guilty of fraud, with or without intention to evade said taxes, or of any wilful or other attempt to defeat or evade said taxes, or any taxes legally due the complainant herein. That the returns filed by said Updike Grain Company, as aforesaid, were not false or fraudulent, were not made or rendered with the intent to evade any legal tax due, or to become due, from said Updike Grain Company, or the taxes claimed in the amended bill of complaint of the complainant filed herein.

13. That there are not now, and never were, any taxes due or owing to the complainant herein, from said Up-
40 dike Grain Company, or any of these defendants, under the provisions of the Revenue Act of October 3d, 1917, for the reason that provisions of said Revenue Act of October 3d, 1917, are not by their terms made applicable to corporations which were not in existence at the time of the

passage of said Act, nor to stockholders of such corporations, dissolved prior to the passage of said Act; that while the said Act provides for the payment of taxes by taxpayers upon whom the said Act operates on account of income and profits received prior to the passage of the Act, yet no portion of said Act expressly, or otherwise, authorizes the levying of taxes upon corporations which had ceased to exist at the time of and prior to the passage of said Act, nor upon any representatives or stockholders of such corporation. Defendants allege that if said Revenue Act of October 3d, 1917, be so construed as to become applicable to corporations organized under the laws of the State of Nebraska, whose corporate existence had been terminated in accordance with such laws, prior to the passage of the said Act, or if the said Act be so construed as to make unlawful or to invalidate the lawful distribution of the assets of said corporation, made to its stockholders prior to the passage of said Act, and while such distribution was lawful and permitted under existing Laws, then the said Revenue Act of October 3d, 1917, insofar as it may be so construed or applied, is contrary to the provisions of the Fifth Amendment to the Constitution of the United States, in that it deprives these defendants of their property without due process of law, and denies to them the equal protection of the laws, and will result in taking their property for public use without just compensation.

14. This suit is the only suit or proceeding ever begun by the complainant herein, or any person or official representing the complainant herein, for the collection of said taxes.

15. At the time of the commencement of this suit,
41 more than five years had expired from the time such taxes were due, and from the time a return of the income for the taxable year 1917, or for that portion of the fiscal year of said Updike Grain Company in the calendar year 1917, was due from said Updike Grain Company; and the right to collect said taxes from said Updike Grain Company, and these defendants or any of them, was then and is now barred by the statutes of limitations of the United States, in such cases made and provided.

16. At the time of the commencement of this suit, more than six years had expired from the date the assessment of said taxes was made, and the right to collect said taxes from said Updike Grain Company, and these defendants or any of them, was at the time of the commencement of this suit and the filing of the bill of complaint herein, and is now barred by

the statutes of limitations of the United States, in such cases made and provided.

17. That at the time of the commencement of this suit, more than five years had expired from the dates the returns were made by said Updike Grain Company, of its total and entire net earnings and income for the year 1917, and for the fiscal period ending June 30th, 1917, and from the date the amended return, hereinbefore described, was made, received, accepted, ratified, confirmed, approved and acted upon by the Bureau of Internal Revenue at Washington, D. C., and the Commissioner of Internal Revenue, and from the time the returns made by said Updike Grain Company, as aforesaid, were received, accepted, approved, and adopted as the returns of said Updike Grain Company for the computation, determination and assessment of the taxes claimed herein, and the right to collect said taxes from said Updike Grain Company and these defendants, or any of them, was, at the time of the commencement of this suit, and is now, barred by the statutes of limitations of the United States, in such cases made and provided.

18. Further answering said amended bill of com-
42 plaint these defendants allege that ever since the passage of said Revenue Act of October 3d, 1917, there has been a substantial controversy between the complainant herein and these defendants, over the right of complainant to assess any taxes against said Updike Grain Company, under the provisions of said Revenue Act; and to collect any of such taxes from any of these defendants; that said contention has been made by these defendants in good faith; that upon the dissolution and liquidation of said corporation, each and all of the defendants herein received only the amount that they had invested in the stock of said corporation, and in making returns of their individual incomes and net earnings for the year 1917, in good faith assumed that they were receiving for said stock the full par value thereof, and consequently did not deduct from their individual net incomes or earnings, any loss upon said stock, which they will have suffered as of the year 1917, in the event it shall be held in this action that the complainant is entitled to recover herein. In the event, therefore, that the complainant should recover herein, said defendants will have thereby overstated their respective net earnings and incomes for said year, but in what amounts these defendants are now, and at all times herein stated have been, unable to state or determine, and will not be able to state or determine until the final decision of this case.

Wherefore, defendants pray as follows:

1. That the amended bill of complaint of the complainant herein be dismissed and that the defendants recover their costs herein expended.

2. That in the event it shall be determined that there are any amounts owing by any of the defendants herein to the complainant, on account of the taxes set forth in the amended bill of complaint, a redetermination be made of the net income and earnings of each of the defendants herein, and deductions be allowed from said earnings, in the
43 amount of any judgments that may be entered against said defendants, and that the taxes assessed against these defendants upon their individual net incomes and earnings for said year 1917, be re-computed after making and allowing such deductions, and any refund thereby found due said defendants be offset against any judgment that may be entered herein.

3. That in the event it shall be determined that said Updike Grain Company was liable for any additional tax for the year 1917, it be adjudged that said Updike Grain Company was, and is, entitled to a special assessment thereof, pursuant to the provisions of Section 210 of the Revenue Act of October 3d, 1917, Sections 327 and 328 of the Revenue Act of 1918, and such rules and regulations of the Bureau of Internal Revenue and the Commissioner of Internal Revenue, as were and are applicable thereto.

4. That defendants have such other and further relief as to the court may seem just and equitable.

FRANCIS A. BROGAN,
A. G. ELLICK,
ANAN RAYMOND,
Solicitors for Answering Defendants.

Endorsed: Filed Jun. 20, 1927. R. C. Hoyt, Clerk.

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44 (Order granting Defendants, Nelson B. Updike, et al., leave to file interrogatories.)

Now on this 9th day of July, 1927, this cause came on for hearing upon the application of Nelson B. Updike, Metts E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell,

R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart and Jos. P. McGrath, defendants in the above entitled cause, for an order allowing them to file herein, the interrogatories submitted with said application, to be answered by such officers of complainant as are designated in a note at the foot thereof, and it appearing to the court that complainant is a public corporation and that said interrogatories are for the discovery of facts and discovery of documents material to the defense of this cause.

It is, therefore, ordered that said defendants be, and hereby are, allowed to file said interrogatories herein, forthwith and that D. H. Blair, Commissioner of Internal Revenue, T. F. Langley, Chief of Proving Section Income Tax Unit, Bureau of Internal Revenue, James J. Drakeford,
45 Revenue Agent in Charge, Omaha, Nebraska, and A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska, shall separately and fully answer such of said interrogatories, and furnish such of the documents therein requested, as are designated in the note at the foot of said interrogatories, and that said answers shall be in writing, under oath, signed by the officer interrogated, and filed herein within fifteen (15) days after service of same upon the solicitors for complainant.

By the Court:

THOS. C. MUNGER, Judge.

Endorsed: Filed July 9, 1927. R. C. Hoyt, Clerk.

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46 (Application of Defendants Nelson B. Updike, et al., to file additional interrogatories.)

Comes now Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart and Jos. P. McGrath, defendants in the above entitled cause and hereby

apply to the above court or any judge thereof for an order allowing them to file the additional written interrogatories submitted herewith to be answered by D. H. Blair, Commissioner of Internal Revenue, James J. Drakeford, Revenue Agent in Charge, Omaha, Nebraska, A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska, officers of the complainant, a public corporation, as designated in the note at the foot of said additional interrogatories.

FRANCIS A. BROGAN
A. G. ELLICK
ANAN RAYMOND
Solicitors for above named defendants.

Endorsed: Filed Dec. 21, 1927. R. C. Hoyt, Clerk.

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47 (Affidavit of A. G. Ellick.)

United States of America,
State of Nebraska,
Omaha Division—ss:

A. G. Ellick, being first duly sworn on his oath, states that he is one of the solicitors for a number of the defendants in the above entitled cause, for whom answer has been filed herein on June 20th, 1927, and particularly for the defendants Nelson B. Updike and Gorton Roth; that the Updike Grain Company referred to in the petition of the complainant, filed herein, was a corporation organized and existing under the laws of the State of Nebraska, and was duly dissolved on or about August 28th, 1917, whereupon it discontinued business and immediately distributed its entire assets among its stockholders; that in August, 1926, a representative of the Commissioner or Bureau of Internal Revenue of the United States made an examination of the books and records of said Updike Grain Company, which were freely furnished to him by the said Nelson B. Updike and Gorton Roth, with the declared purpose of ascertaining data to proceed against the stockholders of said company, pursuant to the provisions of Section 280 of the Revenue Act of 1926, as transferees of the assets thereof, for the collection of an alleged tax declared to have been assessed against the Updike Grain Company in January, 1920, upon its income and net earnings for the year 1917, under the
48 Revenue Act of October 3d, 1917, being the same tax asserted in the amended bill of complaint filed herein; that in November, 1926, said Nelson B. Updike and affiant, as attorney for said Nelson B. Updike and Gorton

Roth, two of the stockholders of said Updike Grain Company, went to Washington to secure a conference with the officials of the Bureau of Internal Revenue, respecting the liability of said Nelson B. Updike and Gorton Roth, and other stockholders of said company, for said tax or any part thereof, and on November 5th, 1926, conferred with one C. G. Hoffman and one H. T. Lore, Acting Chief and representatives, respectively, of the Division or Section of the Bureau of Internal Revenue having said matter in charge; that in the course of said conference the said Hoffman and Lore were advised by affiant and the said Updike, that they understood the tax, for the collection of which the Bureau of Internal Revenue was threatening to proceed against said stockholders, had been assessed against said Updike Grain Company more than six (6) years before the enactment of the Revenue Act of 1926, and asserted that no proceedings of any kind had been begun against said Updike Grain Company, or any other person, for the collection of said tax, up to the time of said conference; that thereupon the said Hoffman and Lore examined the file containing the records and data respecting said tax, then in their possession, and orally advised affiant and the said Updike that said tax had been assessed against said Updike Grain Company in January, 1920, and that in their opinion the right to collect said tax against said Updike, or any other stockholder of said Updike Grain Company, was barred, but that they would not wish to give a final opinion in said matter, without conferring with the Department or Office of the General Counsel for the Bureau of Internal Revenue; that after further conference with Hoffman and Lore, and certain attorneys
49 or counsel for the Bureau of Internal Revenue, the entire file respecting said tax was directed to be delivered to the office of General Counsel for the Bureau of Internal Revenue, for examination, in connection with a conference to be thereafter held, respecting the following questions:

1. Was the right to collect said tax from the Updike Grain Company then barred by the Statutes of Limitations of the United States?

2. If the right to collect the tax from said Updike Grain Company was then barred, as aforesaid, would that fact bar the right of the United States to proceed against the said Nelson B. Updike and Gorton Roth, and other stockholders of said company, for the collection of said tax?

That thereupon and on or about November 9th, 1926, all of the papers relating to said tax were transmitted by the

said Hoffman and Lore to the office of the General Counsel for the Bureau of Internal Revenue, where same were delivered and referred to L. S. Canon, H. C. Armstrong, and O. P. Vogel, attorneys for the Bureau of Internal Revenue, for a determination of the questions hereinbefore set forth. That in the course of a conference between said attorneys and affiant, and the said Nelson B. Updike, it was asserted by affiant that certain returns had been made by said Updike Grain Company of its total net earnings and income for the year 1917, which had been received, accepted, adopted and approved by the Bureau of Internal Revenue, and the Commissioner of Internal Revenue, as the returns of the said Updike Grain Company for the year 1917, and for the fiscal period ending June 30th, 1917; and that certain amended return or returns had been made by officers and rep-
50 resentatives of said Bureau of Internal Revenue and said Commissioner of Internal Revenue, of the total net income and earnings for the year 1917 and for the fiscal period ending June 30th, 1917, which had been received, accepted, adopted and approved by the Bureau of Internal Revenue and the Commissioner of Internal Revenue, as the returns of said Updike Grain Company under the Revenue Act of October 3d, 1917; and that by reason of said facts, the right to collect said tax was then barred by the Statutes of Limitations of the United States and had been barred ever since five (5) years after said returns had been made; also that an assessment of said tax had been made against said Updike Grain Company in January, 1920, which assessment was based upon the returns, aforesaid, and which was duly endorsed upon one of said returns and duly entered upon the regular assessment roll kept for that purpose, respecting all assessments of taxes of that character, and duly certified to the Collector of Internal Revenue at Omaha, Nebraska, and that by reason of all of the facts aforesaid the right to collect said tax against the stockholders of said Updike Grain Company was then barred by the Statutes of Limitations of the United States; that in order to intelligently discuss the legal questions involved and to determine the liability of said stockholders, and whether or not said taxes were barred as aforesaid, it was necessary to verify the facts so [started] by affiant, or in any event to ascertain the exact facts disclosed by said files and records. That thereupon affiant and the said Updike asked to be permitted to view the files and records respecting the above matters, and then in possession of the attorneys for the Bureau of Internal Revenue, present at said conference; that

although a claim was being asserted by said attorneys
51 against said Updike and other stockholders, for said tax, that was based upon the record then in their possession, said attorneys refused to permit either affiant or said Updike to view the records and documents aforesaid, for the purpose of ascertaining the facts determinative of said liability, and refused to state to, or advise, affiant or the said Updike what said records and documents disclosed in that respect, asserting as a reason for said refusal that inasmuch as said Updike Grain Company had been dissolved the said Updike was no longer a stockholder of said corporation, and that permission to view said records and documents, or to ascertain the facts respecting same, could not be disclosed without authority from the Commissioner of Internal Revenue, and suggesting that in order to expedite decision of the question, as to the right of said Updike and affiant to view said records and documents, or to ascertain the facts respecting the contents of same, a communication be immediately directed to the Commissioner of Internal Revenue, for a ruling upon the right to view same; that as a result of said refusal to disclose the facts contained in said record and documents, affiant and the said Updike were compelled to discuss the merits of said claim, without ascertaining the record evidence and facts, upon which said claim was based, but were assured further conference, when authority to examine said documents was procured from the Commissioner of Internal Revenue; that in order to expedite the determination of said liability, affiant on the morning of November 12th, 1926, personally delivered to the office of the Commissioner of Internal Revenue, Treasury Building, Washington, D. C., a written communication addressed to him and signed by said Nelson B. Updike, requesting a ruling upon the
52 right or privilege of the said Updike, or affiant, to view the above records or documents, or to secure copies of same, which communication was as follows:

"The Updike Grain Company of Omaha, Nebraska, was dissolved in August 1917, and its assets distributed to its stockholders, the undersigned, Nelson B. Updike, being one of the principal stockholders. In January 1920, a tax was assessed against the Updike Grain Company under the Act of October 3, 1917. This tax has not been paid. The Income Tax has indicated an intention to assert a liability for this tax against me under Section 280 of the Revenue Act of 1926.

"I am in Washington at the present time conferring with representatives of the Income Tax Unit and attorneys asso-

ciated with the office of the solicitor of Internal Revenue, with respect to this liability.

"In a conference late yesterday afternoon with H. C. Armstrong, O. P. Vogel and L. S. Cannon, attorneys representing the Internal Revenue Department, I asked to see certain documents relating to this tax. This request was denied because the attorneys feared that they were not permitted to exhibit or give copies of these documents to me because of the fact that the Updike Grain Company had been dissolved and I, being no longer a stockholder, was not entitled to this information although same is necessary for me to have in order to determine whether or not a liability exists against me for this tax.

"At their suggestion, I am asking for a ruling from your Department respecting my right to examine and to have copies of the following documents:

53 1. The return of the Updike Grain Company for the fiscal year ending June 30, 1917.

2. The return of the Updike Grain Company for the period extending from July 1, 1917, to the date of dissolution in August 1917.

3. The return upon which the tax was assessed under the revenue act of October 3, 1917, being the assessment made in January 1920.

4. The report of the Government auditor or collector, or deputy collector of Internal Revenue forwarded to your department in connection with the return upon which the tax was based.

5. The letter of transmittal to your department accompanying the return or report upon which the tax was based.

"Further conference respecting my liability is being deferred until I ascertain if I can have the above information, and I am remaining in Washington awaiting your ruling. I will, therefore, appreciate it if you can expedite your ruling in this matter as much as possible. In the event you determine that I am entitled to have this information, will you kindly instruct Mr. Armstrong to furnish same to us?

"My address is—Hotel Hamilton, Room 700."

That on November 13th, 1926, said Updike received the following acknowledgment of receipt of said communication

dated November 12th, 1926, and signed C. R. Nash, Assistant to the Commissioner, by C. G. Hoffman:

"Receipt is acknowledged of your letter dated November 12, 1926, in which you request a ruling as to whether you are entitled to examine and receive copies of certain returns and related papers regarding the income tax liability of the
54 Updike Grain Company, (dissolved) Omaha, Nebraska, for the eleven-month period ended June 30, 1917 and the period July 1 to August 28, 1917.

"You are advised that your request will be given careful consideration and an endeavor will be made to advise you fully with regard to the matter, at the earliest practicable date."

That thereafter affiant and the said Updike made numerous efforts to secure a ruling upon the communication to the Commissioner of Internal Revenue, dated November 12th, 1926, and to secure a further conference with the attorneys for the Bureau of Internal Revenue, after ascertaining the facts and data requested in said communication, and remained in Washington, D. C., until November 20th, 1926, for that purpose, and for a ruling upon the liability of the said Updike, and other stockholders, for said tax, but without avail; that on account of important engagements of said Updike and affidavit, at Omaha, Nebraska, and the expense of remaining in Washington, and the inability to secure any definite statement from anybody connected with the office of the General Counsel for the Bureau of Internal Revenue, or to the Bureau of Internal Revenue, respecting the time when a reply would be forthcoming to the communication to the Commissioner of Internal Revenue, dated November 12th, 1926, or as to the liability of the said Updike and other stockholders for said tax, affiant and said Updike were required to return to Omaha, without having an opportunity to view said records and documents, or to ascertain the facts respecting same, and without a conference, when possessed of said facts, and on November 20th, 1926, affiant addressed and forwarded to Alexander W. Gregg, General Counsel
55 for the Bureau of Internal Revenue, the following communication, wherein the facts are correctly stated:

"We were very much disappointed to learn this morning as result of a personal visit to your office, that no opinion would be rendered in above matters by your Department this week, and that you were out of the city to be gone until the latter part of next week.

"Inasmuch as we have been advised by members of your Department to whom consideration of the above matters were referred by you, that a final opinion would not be rendered until submitted to you for your personal approval, it does not seem likely that we will have your decision until another week has expired.

"As you know, we have remained here for the purpose of expediting a settlement of the controversal matters respecting the above taxes and the liability of the transferees therefor so as to relieve Mr. Updike of the embarrassment which the uncertainty of his liabilities in this matter has caused him since the tax was assessed against the Updike Grain Company in January, 1920. Mr. Updike is a man of large and varied affairs and his stay here has been at considerable financial sacrifice.

"So that you may have before you the chronology of our contact with the Internal Revenue Department since our arrival in Washington on November 4, 1926, I am setting forth same:

Nov. 5, 1926. Conferred with Messrs. Hoffman and Lore of the Rules and Regulations Department respecting the withholding of sending out sixty day notices to transferees until facts and law respecting the liability of transferees
56 could be ascertained and determined, at which informal conference the matter was deferred until Tuesday, Nov. 9th for opportunity of Mr. Lore to confer with your Department respecting liability of transferees for tax.

Nov. 9, 1926. Advised by Mr. Lore that the matter could not be determined until a joint conference was had with Mr. Mitchell of your Department and with Mr. Lore of the Rules and Regulations Department.

Nov. 9, 1926. Held joint conference with Messrs. Mitchell and Lore, which was not completed because Mr. Mitchell was required to leave the city until Nov. 13th.

Nov. 9, 1926. With the consent of Mr. Mitchell, conferred with you in presence of Mr. Lore respecting above liability, at which conference it was stated that in event papers were promptly sent over by the Rules and Regulations Department, an opinion would be forthcoming in all probability by the end of that week.

Nov. 11, 1926. Advised by Mr. Armstrong of your Department, that papers had been received and that he was pre-

pared for a conference. Owing to the absence of Mr. Updike from the city, conference was set for four o'clock P. M. the same date.

Nov. 11, 1926—4 P. M. Conferred with Messrs. Armstrong, Cannon and Vogel at which conference we desired to view the documents upon which the taxes against the Updike Grain Company were based so as to possess ourself of the facts, necessary for us to know, to determine the liability. A view of these documents was refused on the ground that Mr. Updike was no longer a stockholder of the corporation, and suggestion made that we address a communication to the Commissioner of Internal Revenue for a ruling of our right to view the above data.

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Nov. 12, 1926. Addressed written communication to the Commissioner of Internal Revenue requesting a ruling upon our right to view the above data or to secure copies of same, and in the event of a ruling granting that right, that Mr. Armstrong be advised accordingly.

Nov. 2, 1926. Written advice from C. R. Nash, Assistant to the Commissioner, that our request would be given careful consideration and that we would be advised at the earliest practicable date.

Nov. 13, 1926. Delivered memorandum brief covering law respecting the facts available as to liability of transferees, with advices that brief could not be furnished upon certain branches of the controversy until the data theretofore requested had been furnished.

58

Nov. 15, 1926. Advised by Mr. Armstrong that brief had been delivered to him and that opinion would come forth promptly, but that he had received no instructions respecting our right to view the data referred to above.

Nov. 16, 1926. Delivered written communication to you advising that no opinion had come to us from your Department, and asking that the matter be expedited as much as possible on account of business demands upon Mr. Updike.

Nov. 18, 1926. Advised by Mr. Armstrong that he had received no instructions respecting our right to view above data; that opinion was not yet available respecting the questions presented in our memorandum brief, but that opinion would be forthcoming from your Department on or before Nov. 20th.

Nov. 19, 1926. Telephoned your office to arrange a conference in order to expedite ruling upon our right to view data referred to above, and opinion upon liability of transferees.

Nov. 20, 1926. Advised by your office that the matter
59 was now in the hands of Mr. Cannon; that you were out of the city to be gone until the latter part of next week.

Nov. 20, 1926. Advised by Mr. Cannon's office that opinion from him would not go forward to your office until Nov. 22nd or 23rd.

"Important business engagements of both Mr. Updike and myself at Omaha which have been postponed from time to time as result of our stay here, can no longer be deferred, and we are compelled to leave for Omaha today.

"Because of the fact that we have been unable to view or secure copies of certain data affecting the liability of Mr. Updike in the above matters, we have been unable to have a conference respecting all of the questions involved. We are, therefore, requesting that in the event you should from the brief submitted by us conclude that there exists a liability at law or in equity against the transferees of the assets of the Updike Grain Company, that before sixty day letters are sent out to such transferees, a further hearing be given us upon the situation as presented by the facts withheld from us, in the event a ruling is made that we are entitled to have such data.

"In connection with the interpretation of Sec. 280 of the Revenue Act of 1926, we hand you herewith a copy of a communication addressed to Honorable William R. Green, Chairman of Ways and Means Committee of the House of Representatives, by Mr. Edward P. Smith of Omaha, Neb.,
60 an attorney interested in a similar case. We also hand you a copy of Mr. Green's reply, setting forth his understanding of the intent of Congress respecting the import of Sec. 280.

"If we may have the honor of a reply to this communication, we will appreciate it if you will address it direct to the undersigned—A. G. Ellick, 700 First Natl Bk Bldg., Omaha, Nebraska."

That the letters exchanged between the said Edward P. Smith and William R. Green, and enclosed, as aforesaid, were as follows:

"November 19, 1926.

"The Honorable William R. Green,
Chairman, Ways and Means Committee,
House of Representatives,
Washington, D. C.

Dear Mr. Green:—

Some uncertainty seems to exist as to the true intent and meaning of Congress in adopting Section 280 of the Revenue Law of 1926, especially with reference to the right of the Revenue Department to make an assessment against the transferee of corporate property for the amount of tax theretofore assessed against the corporation where the right to proceed against the corporation for the collection of the tax so assessed, either by suit or other proceedings, had become barred by the statute of limitations before the enactment of the Revenue Law of 1926.

If it is not asking too much of you, and is not incompatible with your public duties, I would greatly appreciate a statement from you as to your understanding of the true meaning and intent of Congress in that regard.

61 Thanking you for your attention to this, and with personal regards, I am

Very truly yours,

(Signed) EDWARD P. SMITH"

"Committee on Ways and Means
House of Representatives
Washington, D. C.

November 19, 1926.

Mr. Edwin P. Smith,
Hotel Hamilton,
Washington, D. C.

My dear Mr. Smith:—

Replying to your inquiry with reference to the intention of Sec. 280 of the revenue law of 1926 in respect to the Statute of Limitations, I would say that so far as I am personally concerned, I had no intention of extending this statute to the cases which were barred by the Statute of Limitations prior to the enactment of the law of 1926. I have not talked with any other members of the Conference Committee and hence do not know what may have been in their minds.

This provision was, as you know, inserted in conference when there was no time to carefully examine the manner in

which it was framed or for any extensive discussion of its purposes. At the time, it was said that the object of the provision was to enable the Internal Revenue Bureau to bring a suit directly against the transferees of property involved in the tax levied, and I have no recollection of any other purpose being mentioned.

Very truly yours,

(Signed) W. R. GREEN"

That thereafter affiant received from D. H. Blair, Commissioner of Internal Revenue, the following communication dated December 7, 1926, in answer to affiant's letter of
62 November 20th, 1926:

"Receipt is acknowledged of your letter addressed to the General Counsel under date of November 20, 1926, concerning the matter of the income tax liability of the Updike Grain Company.

"It has been decided that no steps will be taken to assess against Mr. Updike any liability of the Updike Grain Company, as provided in Section 280 of the Revenue Act of 1926. The matter of bringing suit on an alleged agreement that the distributees, in the case of the Updike Grain Company, would pay the income tax liability of said company in the event the Government won in the suit brought in the matter of the liability of the Missouri Valley Elevator Company case, is being considered further and will be decided at a later date.

"Request was made for copies of any returns that may have been made up by the Collector or the Commissioner for the Updike Grain Company. Since Mr. Updike is not now a stockholder of that company, the company having been dissolved in 1917, and since no assessment under Section 280 of the Revenue Act of 1926 is to be made, we must decline to give any further information concerning such returns."

Shortly after April 2d, 1927, the date the bill of complaint was filed herein, affiant asked J. C. Kinsler, the United States District Attorney for Nebraska, to exhibit to affiant the records upon which the tax involved in the above case was based, and he replied that he would be glad to exhibit to affiant any and all papers that he might have in his possession, and upon which the claim is based, but that he had no
63 such papers in his possession, but would immediately obtain same from the authorities at Washington, when he would allow affiant to examine same; that on April 14th,

1927, defendant Gorton Roth transmitted to the Commissioner of Internal Revenue, at Washington, D. C., a request for copies of certain documents in the following form, approved by the Bureau of Internal Revenue in proceedings under Section 280 of the Revenue Act of 1926:

"In connection with the recent suit instituted in the United States District Court, for the District of Nebraska, Omaha Division, entitled "United States of America vs. Nelson B. B. Updike, et al". Equity No. 853, wherein tax liability is being asserted against me of $7,478.23, as a transferee or distributee of the assets of the Updike Grain Company, Omaha, Nebraska, I hereby request a copy of the return and essential related papers of Updike Grain Company, transferror, for the year 1917 and the fiscal year July 1st, 1916, to June 30th, 1917, in order that I may be fully advised as to the basis of the assessment made.

"I particularly request copies of the following papers and documents:

1—Original return of Updike Grain Company, for 11-month period ended June 30th, 1917, filed on or about September, 1917.

2—Excess profits tax return for the 11-month period ended June 30, 1917, filed on or about September, 1917.

3—Amended excess profits tax return for 11-month period, ended June 30, 1917, filed on or about September,
64 1917.

4—Final return covering period ended August 31st, 1917, filed on or about January 25th, 1918.

5—Statement of secretary of Updike Grain Company, dated on or about March 26th, 1918, respecting dissolution of company.

6—Reports made by Smith and/or Jones, upon examination of books of the company in October, 1918.

7—Any returns, schedules or reports, made by the Commissioner of Internal Revenue, or any collector, deputy collector, revenue agent or other representative of the Bureau of Internal Revenue, respecting the taxes for which liability is being asserted against me.

8—The assessment roll of the Commissioner of Internal Revenue, upon which was entered the above described assess-

ment against the Updike Grain Company, or so much thereof as shows the assessment and the date thereof.

9—The return, report, schedule or other document, upon which the assessment against the Updike Grain Company, described above, was endorsed.

"I am a transferee of the assets of said Updike Grain Company, Omaha, Nebraska."

That thereafter affiant made several inquiries of the said District Attorney, respecting receipt of said papers, and on May 5th, 1927, being advised that neither the file referred to above, nor photostat copies of same, had been received, and affiant being anxious to see said documents before preparing answer herein, went to Washington, D. C., with a
65 power of attorney from Gorton Roth, one of the defendants herein authorizing him to view the files, records and documents upon which said tax is based, and relating thereto; that said power of attorney was and is in words and figures following:

"The undersigned, a former stockholder in the Updike Grain Company and one of the defendants in the suit recently instituted in the United States District Court, for the District of Nebraska, Omaha Division, entitled "United States of America vs. Nelson B. Updike, et al", Equity Number 853, Hereby Constitutes and Appoints Alfred G. Ellick, whose address is 700 First National Bank Building, Omaha, Nebraska, and his partners and associates, his Attorney-at-Law and Attorney-in-fact, to represent him in the Bureau of Internal Revenue, and in the above entitled case, in connection with the Federal taxes proposed to be levied upon, or collected from, the stockholders of said company, with full power of revocation and substitution.

"You Are Hereby Expressly Authorized to discuss frankly with him, or his partners or associates, all matters in relation to said Federal taxes. Upon request of him or his partners or associates, you are authorized to exhibit to him, or them, or furnish to him or them, copies of any returns, schedules, Revenue Agent's reports, correspondence or any other documents in relation to said taxes, and particularly the following documents:

1—Original return of Updike Grain Company, for 11-month period ended June 30th, 1917, filed on or about September, 1917.

66 2—Excess profits tax return for the 11-month period ended June 30, 1917, filed on or about September, 1917.

3—Amended excess profits tax return for 11-month period, ended June 30, 1917, filed on or about September, 1917.

4—Final return covering period ended August 31st, 1917, filed on or about January 25th, 1918.

5—Statement of secretary of Updike Grain Company, dated on or about March 26th, 1918, respecting dissolution of company.

6—Report made by Smith and/or Jones, upon examination of books of the company in October, 1918.

7—Any returns, schedules or reports, made by the Commissioner of Internal Revenue, or any collector, deputy collector, revenue agent or other representative of the Bureau of Internal Revenue, respecting the taxes for which liability is being asserted against me.

8—The assessment roll of the Commissioner of Internal Revenue, upon which was entered the above described assessment against the Updike Grain Company, or so much thereof, as shows the assessment and the date thereof.

9—The return, report, schedule or other document, upon which the assessment against the Updike Grain Company, described above was endorsed."

That affiant before leaving for Washington, requested a letter from said United States District Attorney,
67 directed to the Bureau of Internal Revenue, or the attorneys for the Bureau of Internal Revenue, authorizing them to exhibit to affiant said files, records and documents, who stated that as the documents were not in his possession or charge, such letter would be useless and unnecessary; on the afternoon of May 9th, 1927, affiant interviewed Irwin R. Blaisdell, Head of the Civil Division of the Bureau of Internal Revenue, in his office at Washington, D. C., exhibited to him the power of attorney, aforesaid, identified himself as the attorney named therein, and requested an opportunity to view the files, records and documents aforesaid, for the declared purpose of ascertaining for and on behalf of the said Roth, the facts respecting the claims set forth in the amended bill of complaint, filed herein, relieving the Government of the necessity of sending the originals of said documents to Omaha, and expediting the hearing and trial of said case by stipulating with respect to said records; that the said Blaisdell stated that he had received requests

for photostat copies of certain documents from defendant Gorton Roth, defendant Ed P. Smith and from J. S. Kinsler, United States District Attorney, and that he had recently and at the same time forwarded all of said requests to the Government Department making photostat copies of records of that character, and that photostat copies were being made and would be forwarded to the above named persons as requested, at an early date. With respect to seeing the originals of the documents requested by Mr. Roth, or any other documents in said file, Mr. Blaisdell first stated that he did not have the papers in his possession, and when advised that he certainly could have the papers sent to him, he then advised affiant to return the next day, when he would advise affiant whether or not he could see said papers. Upon returning to the office of Mr. Blaisdell, the following
68 day, affiant was advised that, under the rules and regulations of the Treasury Department, he could not exhibit to affiant, either as attorney for Mr. Roth, or Mr. Updike, or as the attorney-in-fact, named in the Power of Attorney executed by Mr. Roth, or even to the said Updike or Roth, personally, any of the documents or files relating to said matter. At the insistence of affiant that he be referred to some one who might finally determine that question, affiant was taken to the office of P. C. Alexander, who examined said rules and regulations of the Department and Power of Attorney given to affiant by said Roth, and after reading the rules and regulations referred to by Mr. Blaisdall, stated that he did not think the rules referred to by Mr. Blaisdall applied to this particular case, but would not want to decide that matter, and suggested that Mr. Blaisdall take the matter up with Mr. C. M. Cherest, Assistant General Counsel for the Bureau of Internal Revenue. Being unable to reach Mr. Cherest that day, affiant was advised to return to the office of Mr. Blaisdell the following morning. Upon returning to the office of Mr. Blaisdell, the following morning, affiant and Mr. Blaisdall went to the office of Mr. Cherest, and after a conference between Mr. Blaisdell and Cherest, only, in his private office, affiant was asked into the conference, when affiant was advised that they had concluded that they could not exhibit the file or any of the matters referred to in the written request of said Roth, or the Power of Attorney of said Roth; that the case was in the hands of Mr. Kinsler, United States District Attorney, and that they would not wish to show the files without his consent; affiant offered to telegraph Mr. Kinsler for his consent, but Mr. Cherest advised that he would not wish to show the files even though Mr. Kinsler should

wire [autorhoty]; affiant stated that in a matter of this importance, he would wish to see the originals of said
69 files, and that he would not have an opportunity to do do so unless the original files were sent to Omaha, which affiant stated he understood was not the custom of the Department; thereupon Mr. Cherest stated that they would send photostat copies of the entire file to Mr. Kinsler, and if upon examination of same, with the consent of Mr. Kinsler, affiant concluded that he would wish to see the originals, they would send the originals out to Mr. Kinsler for affiant's examination.

Affiant further states that upon returning to Omaha, affiant ascertained that the photostat copies requested by Mr. Kinsler had been received by Mr. Kinsler, and that the photostat copies requested by said Roth and Smith had not been received; on May 24th, 1927, affiant requested the District Attorney to exhibit to him the photostat copies of the files which he had received, stating that the attorneys at Washington had advised him that the case was entirely in his hands and that it was entirely in his discretion as to whether or not the photostat copies of the files should be shown to affiant, whereupon the District Attorney advised that he would not wish to exhibit the files to affiant without the consent of the attorneys for the Bureau of Internal Revenue at Washington; thereupon affiant, under date of May 27th, 1927, addressed and mailed the following communication to Irwin R. Blaisdell, Washington, D. C.;

"Mr. Gorton Roth, who some time ago requested photostat copies of certain documents in connection with the tax assessed against the Updike Grain Company, advises that he has not received the copies, although we are advised by the District Attorney that the photostat copies requested by him, subsequent to our request, have been received by him. The District Attorney, however, refuses to show us these copies without written authority from Washington;
70 consequently we are in the same position that we were in when in Washington, when your Department refused to show us any of the documents upon which the tax is based, and referred us to the District Attorney here, to secure his permission to see the documents.

"We will appreciate it if you will write us that, so far as your Department is concerned, you are willing that we shall see the photostat copies of the files and records upon which

the tax against the Updike Grain Company is based, and which have been forwarded to the District Attorney at Omaha. We want to stop, if possible, being passed back and forth between the authorities at Washington and the District Attorney's office here. We will appreciate it if you will expedite transmission of the photostat copies requested by Mr. Roth.

"As stated to Mr. Alexander and Mr. Cherest, while in Washington the fore part of this month, it would seem to us that if the Government has a valid claim against Mr. Updike and the other stockholders of the Updike Grain Company, for the taxes asserted in the above suit, it ought to be willing to exhibit the record upon which it bases that claim, and if the records which have been repeatedly denied to us do not justify the claim, somebody in connection with the Government ought to be courageous enough to stand up and say so, and terminate these proceedings which now have all the aspects of persecution."

On June 4th, 1927, said Gorton Roth addressed and transmitted to the Commissioner of Internal Revenue, the following letter:

71 "Registered Omaha, Nebr. June 4, 1927.

Commissioner Internal Revenue,
Washington, D. C.

Attention IT:RF

Gentlemen:

On April 14, 1927 I requested copies of nine sets of papers and documents, this in connection with suit instituted in the United States District Court for the District of Nebraska, Omaha Division, entitled United States of America vs. Nelson B. Updike, et al., Equity No. 853, wherein tax liability is being asserted against me of $7,478.23 as a transferee or distributee of the assets of the Updike Grain Company, Omaha, Nebraska.

I have had no acknowledgment to this request and have not received the papers.

I will appreciate it if you will advise me promptly whether or not you received this request and whether or not I will be furnished with the documents requested.

Yours truly,

RW (Signed) GORTON ROTH

618 Omaha Grain Exchange"

Under date of June 8th, 1927, the following reply was received to the letter of affiant to Irwin R. Blaisdell, from A. W. Gregg, General Counsel for the Bureau of Internal Revenue:

"Answering your letter of May 27, 1927, addressed to Mr. Blaisdell of this office, in regard to photostat copies of certain documents heretofore requested by Mr. Gorton
72 Roth in connection with the above entitled suit, you are advised that the matter has been referred to the Department of Justice for appropriate action."

Under date of June 9th, 1927, the following reply was received to the letter of Gorton Roth to the Commissioner of Internal Revenue, dated June 4th, 1927, signed A. W. Gregg, General Counsel:

"Receipt is acknowledged of your letter of June 4, 1927, with reference to copies of papers and documents previously requested by you. You are advised that this matter was covered by a letter, date June 8th, 1927, addressed to your attorney, Mr. A. G. Ellick. A copy of said letter is herewith enclosed for your information."

No further answer to the letter of affiant to Mr. Blaisdell, dated May 27th, 1927, or to the letter of said Roth to Commissioner of Internal Revenue, dated June 4th, 1927, has been received, either from the offices of the Bureau of Internal Revenue, or of the General Counsel for the Bureau of Internal Revenue, or from the Department of Justice, to which said letters had been referred; that affiant continued to make requests upon the United States District Attorney, to examine the photostat copies of the files in his possession, and on June 13th, 1927, was advised that if he would appear at the office of the District Attorney on June 15th, at 9:00 o'clock, A. M., the photostat copies of the records in his possession would be exhibited; on said date, affiant
73 appeared at said office and there were exhibited to him photostat copies of the following documents:

Income tax return of said Updike Grain Company dated July 24th, 1917, filed July 25th, 1917;

Excess profits tax return of said company, dated August 29th, 1917, filed August 30th, 1917;

Amended excess profits tax return of said company, dated September 27th, 1917, filed September 28th, 1917;

Return form 1031, attached to which is a certificate dated March 26th, 1918;

Income tax return dated January 25th, 1918, filed January 29th, 1918;

Copy of a letter dated October 26th, 1918, to Commissioner of Internal Revenue from John J. Gillin, Revenue Agent in Charge at Omaha, Nebraska, transmitting report of L. C. Smith, of date October 25th, 1928, with exhibits and forms 1031 and 1103 attached thereto (minus forms 7894 mentioned therein);

Letter of date June 30th, 1919, to said Commissioner from said Revenue Agent in Charge, transmitting transmittal report of L. C. Smith, of date June 30th, 1919.

That the photostat copies exhibited to affiant were not in all respects legible and were not photostat copies of the entire file in the possession of the Government, relating to the tax involved herein, particularly correspondence between the Revenue Agents and the Commissioner of Internal Revenue or his subordinates, or between the Collector of Internal Revenue at Omaha, Nebraska, and the Commissioner of
74 Internal Revenue, respecting said tax, or between the Revenue Agent in charge at Omaha, Nebraska, and the Commissioner of Internal Revenue, respecting the said tax and the assessment thereof, or returns and amended returns made in connection with said tax, or the assessment roll showing the assessment against the Updike Grain Company, of said tax, and the date thereof, or the certification of said assessment to the collector of Internal Revenue at Omaha, Nebraska, or the abatement of the charges of said assessment against the Collector of Internal Revenue at Omaha, Nebraska, or numerous other papers in said file, the exact nature of which affiant is unable to state, all of which files are essential to a determination of the right to enforce collection of said taxes against the answering defendants herein, and to the defense of said answering defendants.

That on the 9th day of July, 1927, an order was entered herein authorizing the filing of interrogatories by the defendants represented by affiant, pursuant to the provisions of Rule 58 of the Rules of Practice of the Courts of Equity of the United States, and directing the persons named in said interrogatories to answer same. That upon the same date said interrogatories were filed herein to be propounded to D. H. Blair, Commissioner of Internal Revenue, T. F. Langley,

Chief of Proving Section, Income Tax Unit, Bureau of Internal Revenue, James J. Drakeford, Revenue Agent in Charge, Omaha, Nebraska, and A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska. That on July 11, 1927, said J. C. Kinsler, advised affiant over the telephone that he had just had a chance to glance over the interrogatories filed by said defendants and that he found that said defendants were asking for copies or originals of a number of
75 documents in the file of D. H. Blair, Commissioner of Internal Revenue; that it would be impossible for Mr. Blair to furnish such documents because of the said Kinsler had recently requested the Bureau of Internal Revenue to transmit to the said Kinsler the entire file and that same had been received by him about a week ago; that we were at liberty to examine the file then in his possession but on account of his engagements with the grand jury he would not be able to furnish same to us for examination until Monday, July 18, 1927. Affiant further states that on July 13, 1927, the said Kinsler advised affiant that he had not yet forwarded the interrogatories to Washington to be answered by D. H. Blair and T. F. Langley, and that he did not know whether it was his duty to attend to having them answered or not. Affiant advised the said Kinsler that he understood it was the duty of the attorney of record to attend to having said interrogatories answered, whereupon the said Kinsler stated that there might be some question as to whether or not the equity rule under which the interrogatories were filed applied to the United States Government.

Affiant further states that on July 18, 1927, some one representing himself to be from the office of the said Kinsler telephoned affiant stating that the said Kinsler would be unable to confer with affiant at 9:00 A. M. on said date as previously arranged, but would confer with affiant at the said Kinsler's office at 2:00 P. M. on July 19, 1927. At the last stated time affiant and Gorton Roth appeared at the office of the said Kinsler for an examination of the files in his possession, whereupon the said Kinsler stated that he had just had an opportunity to examine the interrogatories more
76 carefully and it seemed to him we were asking a great many questions he could not answer and he thought the proper thing to do would be to return the files to the Commissioner of Internal Revenue and forward to him the interrogatories to be answered. Affiant then inquired if the said Kinsler had in his possession the original income tax return of the Updike Grain Company, subscribed July 24th,

1917, whereupon the said Kinsler produced the income tax returns and reports, of which photostat copies had been shown to affiant on June 15, 1927, and the following additional documents:

Photostat copy of Page 14 of the Assessment Roll or List for January, 1920. Upon line one of which was endorsed the assessment against the Updike Grain Company, but the amount of assessment was not set out opposite the name of the Updike Grain Company, but on a line or two below said name, and opposite the name of the Updike Grain Company had apparently been pinned a slip of paper which obscured any entries which might have been made opposite said name.

Photostat copy of the Tax List Report of additional assessments for the District of Nebraska, January, 1920.

The original of the claim for abatement filed by the Updike Grain Company on or about February 19, 1920.

Certain personal returns of Nelson B. Updike.

Thereupon affiant and the said Roth requested the privilege of examining the entire file which had been transmitted to said Kinsler by the Bureau of Internal Revenue, which the said Kinsler refused, stating that a lot of it was cor-
77 respondence which we were not entitled to see. Affiant thereupon went through the interrogatories, filed, with the said Kinsler, calling for each document which had not been exhibited but same were not exhibited upon the statement of the said Kinsler that he did not have same in his possession.

Affiant further states that under Equity Rule 58 aforesaid, the answers to the interrogatories were required to be filed within fifteen days after they had been served, to-wit: On or before July 24, 1927, unless the time should be extended by the court or judge; that on July 20, 1927, at the request of the said Kinsler affiant executed a stipulation extending the time for filing answers to the said interrogatories to September 1, 1927; that on August 29, 1927, on application of a representative of the said Kinsler, an order was entered herein again extending the time for filing said answers to October 1, 1927. On October 1, 1927, the complainant had again failed to file said answers and was asking for additional time for filing same, and upon the objection of defendants the court directed complainant to file the answers which the said Kinsler admitted he then had in his possession, on or before October 6, 1927. That at said hearing said Kinsler stated to the

court that he had at all times been willing to furnish to the defendants any and all information and documents of which the government was possessed, relating in any way to the taxes involved in this action, without an order of court. That thereafter and on or about October 6, 1927, the answers of D. H. Blair, T. F. Langley, James J. Drakeford and A. B. Allen were filed in the above cause, and upon an examination being made of said answers and at the first opportunity
78 of affiant after attending to other engagements, affiant addressed to the said Kinsler, under date of October 25, 1927, the following communication.

"Hon. James C. Kinsler,
United States District Attorney,
Federal Building,
Omaha, Nebraska.

In re: United States of America vs. Nelson B. Updike, et al.
Equity No. 853.

Dear Sir:

We have examined the answers to the interrogatories filed by certain defendants in the above matter, and find that some of the interrogatories are not "fully" answered as required by equity rule 58, and that some of the answers suggest other interrogatories in order to elicit the entire facts respecting the liability for the tax involved in the above case. Inasmuch as you made the statement at the hearing before Judge Woodrough upon your application for additional time within which to file the answers, that you were willing to furnish us with any and all information and data of which the Government is possessed, respecting said tax, we are adopting this method of securing the additional information we desire, instead of applying for permission to file additional interrogatories, and trust you will give us the information requested within the next fifteen days so that we can have an early hearing of the above case.

In the answers filed by D. H. Blair, we direct your attention to the following:

1. In interrogatory No. 5 we asked (a) for the name of the person who computed and determined the amount of the assessment endorsed upon the return filed July 25, 1917; (b) when same was computed and determined; and (c) what official position was then held by the person com-
79 puting and determining same. The answer does not give us this information. In this connection we wish

you would advise the name of the person whose initials, which we read to be H. B., appear immediately to the right-hand side of the assessment stamp placed upon the return filed July 25, 1917; and the name of the person who endorsed the figures on the right-hand side of page four of the copy of the report of L. C. Smith, Revenue Agent, made to John J. Gillin under date of October 25, 1918; and whether or not the person whose initials appear immediately to the right of the assessment stamp computed and determined the taxes.

2. In connection with answer to interrogatory No. 13, we wish you would advise if, in the event the corporation audit division of the income tax unit did not figure the tax correctly, and it was changed by the proving section of the income tax unit, was it the practice of the Internal Revenue Bureau and the Commissioner of Internal Revenue, to note such change upon the return of the taxpayer, and if so, in what form that change would be noted.

3. Referring to the answer to interrogatories Nos. 17 and 18, we wish you would advise (a) the full names of the persons whose initials appear upon the bottom of the exhibit designated "Tax list report, additional assessments, income tax January, 1920", and what particular duty and office each of such persons performed with respect to the assessment made against the Updike Grain Company in the amount of $373,911.54; and (b) what matter was set out opposite the name of Updike Grain Company in line "O" of the exhibit entitled, "Assessment list, income tax, January, 1920", which has been covered up in the making of the photostat copy by a paper pinned over a part of this line.

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4. In the answer of Mr. Blair to interrogatories Nos. 29 and 30, you state that you are unable to produce the four forms No. 7894, which were transmitted to Mr. Blair in the letter from Mr. Gillin under date of October 26, 1918. If you are still unable to locate the form No. 7894, upon which was set forth a synopsis of the returns for the ear 1917, will you please furnish us with a blank form of that number?

5. In Mr. Blair's answer to interrogatory No. 47, he states that it does not appear that any affidavit was attached to the abatement claim. We are informed that there was an affidavit attached to the abatement claim and wish you would have another search made for same.

6. In the answer of Mr. Blair to interrogatory No. 60, will you please advise if the Bureau of Internal Revenue or the

Commissioner of Internal Revenue has collected assessments such as are therein described from others than the transferees of the assets of the Missouri Valley Elevator Company?

7. In the answer of Mr. Blair to interrogatory No. 68, he states that he is unable to find the affidavit of Gorton Roth, dated March 25, 1918, therein referred to. The writer understood from you that you had a copy of this affidavit and we will appreciate it if you will furnish a copy thereof to us.

8. The photostat copy of the letter of J. G. Bright, Deputy Commissioner, to the Collector of Internal Revenue at Omaha, dated December 30, 1924, attached to the answers
81 of Mr. Blair, refers to a letter of the Collector of Internal Revenue at Omaha to the Commissioner of Internal Revenue dated October 1, 1924. Will you please furnish us with a photostat copy of said letter of October 1, 1924?

9. The photostat copy of the letter of the Collector of Internal Revenue at Omaha to Mr. Blair, dated February 5, 1927, refers to Form No. 53 forwarded to Supervisor James R. Peat for transmittal to Mr. Blair's office on January 7, 1927. Will you please furnish us with photostat copy of the form thus transmitted and any letter of transmittal accompanying the same?

10. In the answer of Mr. Allen to interrogatory No. 42, he states that he is unable to find the letter of the Updike Grain Company to George L. Loomis, Collector of Internal Revenue, dated October 2, 1917. This letter must be in your possession as the record shows a letter of George L. Loomis to the Updike Grain Company answering same. We will appreciate it if you will have another search made for this letter and furnish us with photostat copy of same.

11. In the answer of Mr. Allen to interrogatory No. 64, he states that a copy of the assessment list and certificate of assessment, referred to in that interrogatory, has been supplied by Commissioner Blair in his answer to interrogatory No. 64. In this particular we also desire a photostat copy of the assessment list and certificate of assessment, which was actually forwarded to the Collector of Internal Revenue at Omaha. We wish you would furnish us with photostat copy of same.

12. The photostat copy of the report of C. L. Carlson to James J. Drakeford, dated December 21, 1921, attached to answer of James J. Drakeford, refers to department letter

IT:PA:FR:AGB: Nov. 30, 1921, copy of which is not
82 supplied and we wish you would furnish us with photostat copy of that [latter].

13. The photostat copy of the report of L. C. Carlson, Revenue Agent in Charge, to James J. Drakeford, dated December 21, 1921, refers to Exhibit H as an enclosure. Copy of Exhibit H has not been supplied and we wish you would furnish us with photostat copy of same.

14. The photostat copy of the letter of E. J. Batson, Deputy Commissioner, by A. Lewis, Chief of Section, to Internal Revenue Agent in Charge, Omaha, Nebraska, dated November 30, 1921, refers to a letter from the Internal Revenue Agent in Charge, Omaha, Nebraska, to Batson's office, dated February 16, 1921, and also to reports of the Internal [Referee] Agent in Charge, dated February 16, 1921. The letter of September 16, 1921, and the reports dated February 16, 1921, are not supplied and we wish you would furnish us with photostat copy of same.

Very truly yours,

BROGAN, ELLICK & RAYMOND,
AGE:AL By A. G. Ellick."

Under date of October 26, 1927, affiant received the following reply to said letter:

"Brogan, Ellick and Raymond,
Attorneys at Law,
First National Bank Building,

Omaha, Nebraska.

United States v. Updike and others.

Dear Sirs:
This is to advise you that further information requested by you will be furnished as soon, and so far, as possible.

Yours truly,

(Signed) JAMES C. KINSLER,
James C. Kinsler, United States Attorney."

JCK:LJ

On October 29, 1927, affiant was advised by the said
83 Kinsler orally that he had transmitted the request contained in affiant's letter of October 25, 1927, to the authorities in Washington and that the additional data and

information would be furnished to us within a week or ten days. On November 16, 1927, affiant addressed to the said Kinsler the following communication:

"Hon. James C. Kinsler,
United States District Attorney,
Omaha, Nebraska.

In re: United States of America v. Nelson B. Updike, et al.
Equity No. 853.

Dear Sir:

We wish to direct your attention to our letter of October 25, 1927, requesting additional data and information in the above matter; also to your reply under date of October 26, 1927, and to the writer's oral conversation with you on October 28, 1927, wherein you stated that you had transmitted the request in our letter, as above, to the authorities in Washington and that in your opinion the additional data and information would be furnished to us within a week or ten days.

Eighteen days have now passed since we talked to you and we are writing to inquire if you now have any better advices as to when the information and data will be supplied.

As we have stated to you and representatives of the Bureau of Internal Revenue frequently, the pendency of this stale claim against Mr. Updike and the other defendants, has been a great embarrassment to them in carrying on their respective business affairs and they are now, as they have been at all times in the past, anxious to have their li-
84 ability or non-liability determined at the earliest possible date.

We will therefore appreciate it if you will expedite as much as possible the furnishing of the additional data and information requested so that we may not again be subjected to the delay which the Government occasioned in connection with the answers to the written interrogatories heretofore filed in this case.

If you cannot immediately definitely ascertain when this additional information and data will be furnished, we will appreciate it if you will promptly so advise us so that we may exercise the privilege accorded us by the equity [ruls] to file additional interrogatories. This, as you know, we have not done on account of your assurances that the data and information will be furnished without such procedure.

Very truly yours,
BROGAN, ELLICK & RAYMOND,
AGE:AL By A. G. Ellick."

On November 18, 1927, affiant received from the said Kinsler the following answer to the letter of November 16, 1927:

"Brogan, Ellick & Raymond,
Attorneys at Law,
First National Bank Building,
Omaha, Nebraska.

United States against Updike and others Number 853 Equity,
Omaha Division.

Dear Sirs:

This is to acknowledge receipt of your letter dated November 16, 1927, and to advise you that the writer is making further inquiry regarding the matter of the General Counsel of the Bureau of Internal Revenue.

You will be definitely advised during the early part of the coming week.

Yours very truly,

85 (Signed) JAMES C. KINSLER,
James C. Kinsler, United States Attorney."

Under date of November 25, 1927, affiant received the following additional communication from the said Kinsler:

"Brogan, Ellick & Raymond,
Attorneys at Law,
First National Bank Building,
Omaha, Nebraska.

United States vs. Nelson B. Updike, et al, Number 853 Equity.
Omaha Division.

Dear Sirs:

The writer is in receipt of a letter from the General Counsel of the Bureau of Internal Revenue in which the General Counsel says in substance that in his opinion the answers already given to the questions, which were propounded to the Commissioner and others, are as complete as it is practicable to make them, and that they fully answer the questions propounded.

The General Counsel points out that the additional questions have to do principally with administrative details which appear to be irrelevant to the issues in the suit.

Under the circumstances, the complainant must take the position that the information heretofore given constitutes

full compliance with its duty to answer the interrogatories propounded by the defendants.

Yours very truly,

(Signed) JAMES C. KINSLER,
James C. Kinsler, United States
JCK:G Attorney."

That owing to court engagements and other engagements of affiant, he has been unable to prepare additional interrogatories to be filed herein until this time.

Affiant believes that it is essential for a just determination of the above case that the complainant be required to
86 produce all of the facts and data requested in the interrogatories filed herewith and all other facts and data of which the complainant is possessed relating to the tax involved herein, that said information, facts and data are material to the issues involved in the above entitled case, and that it would be unsafe and unfair for the defendants represented by affiant to proceed to trial of the above case without being possessed of said facts and date.

A. G. ELLICK.

Subscribed in my presence and sworn to before me this 21st day of December, 1927.

(Seal) ALBERTA LYNCH,
Notary Public.

Endorsed: Filed Dec. 21, 1927. R. C. Hoyt, Clerk.

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87 Order Permitting the Filing of Additional Interrogatories.

Now on this 21 day of December, 1927, this cause came on for hearing upon the application of Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart and Jos. P. McGrath, defendants in the above entitled cause, for an order allowing them to file herein the additional interrogatories submitted with said application to be answered by such officers of complainant as are designated in a note at the foot thereof, and it appearing to the court

that complainant is a public corporation and that said additional interrogatories are for the discovery of facts and documents material to the defense of this cause,

It Is Therefore Ordered that said defendants be and hereby are given leave to file said additional interrogatories herein forthwith and that D. H. Blair, Commissioner of Internal Revenue, James J. Drakeford, Revenue Agent in Charge, Omaha, Nebraska, and A. B. Allen, Collector
88 of Internal Revenue, Omaha, Nebraska, officers of the complainant, a public corporation, shall separately and fully answer such of said additional interrogatories and furnish such of the documents therein requested as are designated in the note at the foot of said additional interrogatories, and said answers shall be in writing under oath, signed by the officers interrogated and filed herein within fifteen (15) days after service of same upon the solicitor for complainant.

By the Court:

J. W. WOODROUGH, Judge.

Endorsed: Filed Dec. 21, 1927. R. C. Hoyt, Clerk.

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89 (Motion of Defendants to dismiss filed February 29, 1928.)

Come now the defendants, Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart and Jos. P. McGrath, and respectfully object to the jurisdiction of this court over this controversy and pray that this action be dismissed as to each of them for the reason that by virtue of the provisions of Sections 280 and 274 of the Revenue Act of 1926, and particularly sub-divisions (a) of said sections, the complainant has no right or authority to proceed against said defendants in this court and this court has no jurisdiction over this controversy, all of which is shown by the pleadings and record herein.

FRANCIS A. BROGAN
A. G. ELLICK
ANAN RAYMOND
Solicitors for the above named Defendants.

Endorsed: Filed Feb. 29, 1928. R. C. Hoyt, Clerk.

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90 (Motion of Defendants to dismiss filed March 3, 1928.)

Come now the defendants, Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart and Jos. P. McGrath, and respectfuly show unto the court that this case does not really and substantially involve a dispute or controversy properly in the jurisdiction of this court, for the following reasons:

1. That this case was begun and commenced in this court since the enactment of the Revenue Act of 1926.

2. That this is an action to assess, enforce and collect an alleged liability, at law or in equity, of these defendants as transferees of property of the Updike Grain Company, a corporation, in respect of a tax alleged to have been imposed upon said Updike Grain Company by the Revenue Act of 1917.

3. That neither the Commissioner of Internal Revenue nor any other official of any Department or Bureau of complainant has at any time sent, given or mailed to these defendants, or either of them, the notice of such liability,
91 as required by sub-division (a) of Section 274 of the Revenue Act of 1926.

4. That none of these defendants has, by a signed notice in writing filed with the Commissioner of Internal Revenue, or otherwise, waived the restrictions upon the complainant or Commissioner of Internal Revenue, provided in Sub-division (a) of the Revenue Act of 1926, on the assessment or collection of the whole or any part of said alleged liability.

5. That no jeopardy assessment has been made or attempted to be made by the Commissioner of Internal Revenue of complainant against any of these defendants, for the tax or liability herein sought to be alleged or collected.

6. That none of these defendants has been adjudicated a bankrupt and this is not a bankruptcy proceeding.

7. That no proceedings have ever been instituted or had by complainant, or any of these defendants, before the United

States Board of Tax Appeals, with respect to said tax or liability.

All of which these defendants, and each of them, aver to be true and set up the same in bar of the complaint in the bill against them, and each of them, and pray the court to dismiss the said bill as to them, and each of them, and to give them, and each of them, judgment for their costs.

FRANCIS A. BROGAN
A. G. ELLICK
Solicitors for the above named defendants.

Endorsed: Filed Mar. 3, 1928. R. C. Hoyt, Clerk.

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92 (Order postponing hearing of Motions to Dismiss.)

September term, 1927. Before Judge Munger.

March 10, 1928.

Ordered, by the Court, that hearing on motions of defendants to dismiss, set for this date, be postponed until time of trial of the case.

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93 (Trial, March 26, 1928.)

September Term, 1927. Before Judge Munger.

This cause comes on regularly for trial to the Court, the parties heretofore appearing by their respective attorneys. Evidence is had, and the trial of said cause not being concluded at the hour of adjournment, further proceedings herein are adjourned until tomorrow morning.

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94 (Trial, March 27, 1928.)

September Term, 1927. Before Judge Munger.

This day this cause comes on for further proceedings. Testimony is adduced and the trial of said cause not being concluded at the hour of adjournment, further proceedings herein are adjourned until tomorrow morning.

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95 (Trial, March 28, 1928.)

September Term, 1927. Before Judge Munger.

This day again come the parties hereto by their respective attorneys, evidence is concluded, and said matter duly submitted to the Court.

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96 (Opinion of District Court.)

Munger, D. J.

In this suit the United States seeks to enforce against the transferees of the corporate assets of the Updike Grain Company, a corporation which dissolved August 28, 1917, the amount of a tax for a portion of the calendar year of 1917 which was assessed against the corporation under the provisions of the Revenue Act of October 3, 1917. The approved fiscal year of the Updike Grain Company began August 1, 1916 and ended on July 31, 1917. The essential facts in this case as to dissolution of this corporation in advance of the enactment of the Revenue Act of October 3, 1917 and as to a return made by the defendant under the Revenue acts then in force are quite similar to the facts in the case of United States vs. Updike, 1 Fed. (2d) 550 (on appeal 8 Fed. (2d) 913) relating to the Missouri Valley Elevator Company. In this case the Commissioner of Internal Revenue in January, 1920, made an assessment against the Updike Elevator Company of a tax under the Revenue Act of October 3, 1917, for the period involved, under the retroactive provisions of that Act. The purpose of the suit is to recover the amount of the tax assessed against the defendant from the transferees of the corporate assets.

97 The defendants challenge the jurisdiction of the court to determine this case, because of the provisions of Section 274 and Section 280 of the Revenue Act of 1926. The portions of the Sections involved are as follows:

"Section 280 (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act."

"Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed
98 with the Board, until the decision of the Board has become final."

It does not appear that a notice was given to the defendants as provided in the latter section and for that reason the defendants claim that this suit cannot now be maintained. If the effect upon this suit claimed by the defendants for the provisions of these statutes could be sustained if these provisions stood alone, a later portion in the same Revenue Act of 1926 found in Section 1122 (b) of that Act must also be considered. That portion of the statute reads as follows:

"The district courts of the United States at the instance of the United States are hereby invested with such jurisdiction to make and issue, both in actions at law and suits in equity, writs and orders of injunction, and of ne exeat republica, orders appointing receivers, and such other orders and process, and to render such judgments and decrees, granting in proper cases both legal and equitable relief together, as may be necessary or appropriate for the enforcement of the provisions of this Act. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such provisions."

There appears to be a conflict between the two portions of the Revenue Act of 1926 which have been cited, and in case of such [repugnacy], the latter portion of the statute in the order of araringement will control. United States vs. Jackson, 143 Fed. 783, 787; In re Richards, 96 Fed. 935, 939. The objections to jurisdiction are not well taken.

The defendants also claim that this suit is barred by the statute of limitations relating to the recovery of taxes
99 of this nature. Section 278 d of the Revenue Act of 1926 is as follows:

"Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer."

By this statute Congress has provided that unless the taxpayer had agreed in writing to a longer period no suit in court for the collection of an assessment for any income tax, excess profits tax or war profits tax can be maintained unless the suit is begun within six years after the assessment of the tax. By the terms of this statute this limitation applies not only to the taxes imposed by the Revenue Act of 1926 but also to such taxes imposed by any prior Act of Congress.

No waiver of this limitation has ever been made by the defendants. The assessment was made in January 1920 and this suit was begun in April 1927, more than six years after the assessment, and the defendants have made the defense that the suit was begun too late. On behalf of the United States, the contention is made that this statute does not apply to the facts in this case, because the assessment was not made "within the statutory period of limitation applicable thereto." It may be doubted if the United States may take advantage of this limitation, which was imposed for the benefit of the taxpayer. It is said that unless the taxpayer has made a proper return there is no limitation of time in which the assessment may be made. But in this case an assessment was made. It was made by the Commissioner of Internal Revenue. It is the foundation of this suit. At the time it
100 was made the Revenue Act of 1916, as amended by the Revenue Acts of March 3, 1917, October 3, 1917, and February 24, 1919 was in force. Section 14 of the Act of 1916 in force at the time of the assessment contained the following:

a. * * * * "every corporation, joint-stock company or association, and insurance company, computing taxes upon the

income of the fiscal year which it may designate in the manner hereinbefore provided, shall pay the taxes due under its assessment within 105 days after the date upon which it is required to file its list or return of income for assessment; except in cases of refusal or neglect to make such return, and in cases of erroneous, false, or fraudulent returns, in which case the commissioner of internal revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this title or by existing law; and the assessment made by the commissioner of internal revenue thereon shall be paid by such corporation, joint-stock company or association or insurance company immediately upon the notification of the amount of such assessment; and to any sum or sums due and unpaid after the fifteenth day of June in any year, or after 105 days from the date on which the return of income is required to be made by the taxpayer, and after ten days' notice and demand thereof by the collector, there shall be added the sum of 5 per centum on the amount of tax unpaid and interest at the rate of 1 per centum per month upon said tax from the time the same becomes due; * * * * * *

(b) When the assessment shall be made, as provided in this title, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the commissioner of internal revenue and shall constitute public records and be open to inspection as such."

101 The Commissioner of Internal Revenue had authority under this portion of the statute and under the facts proved in this case, to make a return for the Updike Grain Company. A return is shown to have been made by a report to the Commissioner of Internal Revenue of revenue agents, after examination of the former returns and the books and accounts of the Updike Grain Company, and this return was adopted as a return and acting upon it as such, the Commissioner of Internal Revenue assessed the tax that is the subject of this suit. Whether the return was required to be made within three years or no limitation of time was imposed, the assessment was made in the statutory period of limitation applicable thereto.

The United States has provided, in the many revenue acts of this nature enacted in 1918 and subsequently, many periods of limitation after the expiration of which no action can be taken against the taxpayer, and the Supreme Court of the United States has said that "taxing laws are too liberally interpreted in favor of the taxpayer". Bowers vs. N. Y. &

Albany Co., 273 U. S. 346, 350. It seems to be clear, upon the facts in this case, that the United States delayed proceedings for the collection of the tax it claims to be due from the defendants, until the applicable statute of limitations had barred the successful prosecution of a suit and for this reason the suit will be dismissed at the plaintiff's costs.

Endorsed: Filed Apr. 13, 1928. R. C. Hoyt, Clerk.

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102 (Decree, April 13, 1928.)

In the District Court of the United States for the District of Nebraska, Omaha Division.

United States of America, Plaintiff,
853. vs. Equity.
Nelson B. Updike, et al., Defendants.

This cause having heretofore been submitted, it is ordered that the plaintiff's suit be dismissed at plaintiff's costs, to which the plaintiff excepts.

THOS. C. MUNGER, Judge.

Endorsed: Filed Apr. 13, 1928. R. C. Hoyt, Clerk.

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103 (Order, May 2, 1928, Modifying Decree of April 13, 1928.)

In the District Court of the United States, District of Nebraska, Omaha Division.

United States of America, Plaintiff,
No. 853. vs. Equity.
Nelson B. Updike, et al., Defendants.

The order and decree heretofore entered in this case on April 13, 1928, which reads as follows:

"This cause having heretofore been submitted, it is Ordered, that the plaintiff's suit be dismissed, at plaintiff's costs, to which the plaintiff excepts."

It is hereby modified so as to read:

"This cause having heretofore been submitted, it is Ordered, that the plaintiff's suit be dismissed, each party to pay his own costs; and as so modified the decree is hereby reentered as of this date, to all of which plaintiff excepts."

By the Court:

THOS. C. MUNGER, Judge.

May 2-1928.

Endorsed: Filed May 2, 1928. R. C. Hoyt, Clerk.

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104 (Order allowing Appeal, etc.)

On the 2nd day of May, 1928, this matter came on to be heard on Plaintiff's petition for leave to appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the final order, judgment or decree of this Court made and entered and filed herein April 13, 1928, as modified and re-entered May 2, 1928, dismissing Plaintiff's suit, and thereupon, the Court being fully advised in the premises, it is

Ordered that Plaintiff be, and Plaintiff is hereby granted leave to refile instanter Plaintiff's said petition for leave to appeal to said Circuit Court of Appeals for the Eighth Circuit, said petition having been filed herein May 1, 1928; that Plaintiff be, and Plaintiff is hereby given further leave to refile Plaintiff's Assignment of Errors filed herein May 1, 1928; and it is further

Ordered that Plaintiff be, and Plaintiff is hereby granted leave to amend Plaintiff's said petition for leave to appeal and Plaintiff's said assignment of errors so as to show the refiling and re-entering of said final order of this Court of April 13, 1928, as modified this 2nd day of May, 1928. Leave to Plaintiff to appeal to said Circuit Court of Appeals for the Eighth Circuit is granted by separate order.

By the Court:
THOS. C. MUNGER,
District Judge.

Endorsed: Filed May 2, 1928. R. C. Hoyt, Clerk.

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105 Assignment of Errors.

United States District Court, District of Nebraska, Omaha Division.

United States of America, Plaintiff and Appellant,
Number 853. vs. Equity.
Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo. Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart, Jos. P. McGrath, Ed. P. Smith and George A. Roberts, Defendants and Appellees.

The United States of America, plaintiff and appellant, now comes and assigns the following errors of the trial court upon which plaintiff and appellant will rely in the prosecution of its appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the final order, judgment or decree of the trial court made and entered herein April 13, 1928, and modified and refiled and re-entered herein May 2, 1928, dismissing plaintiff's suit:

1. The trial court erred in finding and holding that plaintiff's suit is a suit for the recovery or collection of a tax or taxes from the defendants.

2. The trial court erred in finding and holding that plaintiff's suit is a proceeding "for the collection of the tax it claims to be due from the defendants."

3. The trial court erred in finding and holding that an assessment made by the Commissioner of Internal Revenue "is the foundation of this suit".

4. The trial court erred in finding and holding in
106 substance that the report of Revenue Agent L. C. Smith (Exhibit 2) was a return which fulfilled the requirements of the Revenue Act of October 3, 1917, and the regulations of the Treasury Department made and promulgated pursuant thereto, requiring Updike Grain Company to make returns for the taxes imposed on said corporation by said Revenue Act of October 3, 1917.

5. Referring to said report of Revenue Agent L. C. Smith, the trial court erred in finding and holding that "A return is shown to have been made by a report to the Commissioner of Internal Revenue, of revenue agents, after examination of the former returns and the books and accounts of the Updike Grain Company".

6. And the trial court, having erred in finding and holding said report of Revenue Agent L. C. Smith to be the return required by the Revenue Act of October 3, 1917, further erred in finding and holding as follows: "and this return was adopted as a return and acting upon it as such, the Commissioner of Internal Revenue assessed the tax that is the subject of this suit".

7. The trial court erred in finding and holding that a tax assessed against Updike Grain Company by the Commissioner of Internal Revenue" is the subject of this suit".

8. When Updike Grain Company neglected and refused to file returns on forms 1031 and 1103 for the taxes imposed

on said corporation by the Revenue Act of October 3, 1917, and as required by Article 61 of Regulations 33 revised of the Treasury Department and by Article 10 of Regulations 41 of the Treasury Department and when the Internal Revenue Department of the United States of America was thereby compelled to have L. C. Smith, one of its Revenue agents, make an audit of the books and records of said Updike Grain Company to determine the amount of taxable income of said corporation under the provisions of said Revenue Act of October 3, 1917, the trial court erred in finding and
107 holding in substance that the report of said revenue agent to the Revenue Agent in Charge at Omaha, Nebraska, constituted the return required by said Revenue Act of October 3, 1917, and said Regulations of the Treasury Department of the United States of America.

9. This is a suit in equity and was brought against defendants, former stockholders of Updike Grain Company, a Nebraska corporation, to compel defendants, as trustees, to account for and pay over to complainant money had and received from said corporation by defendants for the use and benefit of complainant and the trial court erred in not considering said theory of complainant and the subject matter of complainant's suit in equity as set forth in complainant's amended bill of complaint.

10. The trial court erred in finding and holding that in this action (where defendants have been sued by the United States of America and have pleaded that the prosecution of the government's action against them is barred by some statute or statutes of limitation) there should be a liberal construction of the statutes of limitation pleaded, in favor of the defendants.

11. The trial court erred in finding and holding that the Commissioner of Internal Revenue made a return for Updike Grain Company for the taxes imposed on the corporation by the Revenue Act of October 3, 1917, when the Commissioner of Internal Revenue used the information contained in the report of Revenue Agent L. C. Smith (Exhibit 2) in order to make an assessment against Updike Grain Company during the month of January, 1920.

12. The trial court erred in finding and holding that Section 278 (d) of the Revenue Act of 1926 is a statute of limitations properly applicable to complainant's suit; and that

the prosecution of complainant's suit is barred by the
108 provisions of said Section 278 (d) of the Revenue Act of 1926 and that "for this reason the suit will be dismissed at the plaintiff's costs".

13. The trial court erred in finding and holding that the prosecution of complainant's suit is barred by a statute of limitations applicable thereto "and for this reason the suit will be dismissed at plaintiff's costs."

14. The trial court erred in finding and holding as follows: "It seems to be clear, upon the facts in this case, that the United States delayed proceedings for the collection of the tax claims to be due from the defendants, until the applicable statute of limitations had barred the successful prosecution of a suit and for this reason the suit will be dismissed at the plaintiff's costs".

15. The trial court erred in making and entering herein on the 13th day of April, 1928, the final order, judgment or decree, (modified and refiled and re-entered herein May 2, 1928) dismissing complainant's suit from which complainant prosecutes this appeal; said final order, judgment or decree being as follows:

"Order"

"This cause having heretofore been submitted, it is ordered that plaintiff's suit be dismissed at plaintiff's costs, to which plaintiff excepts.

THOS. C. MUNGER,
Judge."

As appears from said final order, judgment or decree complainant was duly allowed an exception thereto, and was likewise allowed an exception to the re-entry of said decree as modified.

15. And said final order, judgment or decree as modified May 2, 1928, being as follows:

"Order"

"The Order and decree heretofore entered in this case on April 13, 1928, which reads as follows:

'This cause having heretofore been submitted, it is ordered, that the plaintiff's suit be dismissed, at plaintiff's costs, to which the plaintiff excepts.'

109 "Is hereby modified so as to read:

"This cause having heretofore been submitted, it is ordered, that the plaintiff's suit be dismissed, each party to

pay his own costs; and as so modified the decree is hereby re-entered as of this date, to all of which plaintiff excepts.

"By the Court:

THOS. C. MUNGER,
Judge."

May 2—1928

16. The trial court erred in finding and holding that the present suit against the defendants as trustees is barred by the limitations provisions of Section 278 (d) of the Revenue Act of 1926, which was enacted only for the benefit of persons other than the defendants in the present action, namely, for the benefit of taxpayers.

17. The trial court erred in finding and holding that said limitation provisions of Section 278 (d) of the Revenue Act of 1926, enacted only for the benefit of taxpayers, could be invoked by the defendants in the present suit.

18. The trial court erred in finding and holding as follows:

"In this suit the United States seeks to enforce against the transferees of the corporate assets of the Updike Grain Company a corporation which dissolved August 28, 1917 the amount of a tax for a portion of the calendar year 1917 which was assessed against the corporation under the provisions of the Revenue Act of October 3, 1917".

19. The trial court erred in referring to Updike Grain Company as "The Defendant".

20. The trial court erred in referring to Updike Elevator Company as "The Defendant".

21. The trial court erred in finding and holding as follows:

"The essential facts in this case as to the dissolution of this corporation in advance of the enactment of the Revenue Act of October 3, 1917 and as to return made by the defendant under the Revenue Acts then in force are quite similar to the facts in the case of United States vs. Updike,
110 1. Federal (2d) 550".

22. The trial court erred in finding and holding as follows:

"In this case the Commissioner of Internal Revenue in January, 1920, made an assessment against the Updike Elevator Company of a tax under the Revenue Act of October

3, 1917, for the period involved, under the retroactive provisions of that act. The purpose of the suit is to recover the amount of the tax assessed against the defendant from the transferees of the corporate assets".

All of which is respectfully submitted.

Dated this first day of May, 1928.

JAMES C. KINSLER,
United States Attorney,
Attorney for Complainant.

23 The trial court erred in re-entering herein on the 2nd day of May, 1928, the final order of the Court of April 13, 1928, as modified dismissing plaintiff's suit and reading as follows:

"Order"

"The Order and decree heretofore entered in this case on April 13, 1928, which reads as follows:

'This cause having heretofore been submitted it is Ordered, that the plaintiff's suit be dismissed, at plaintiff's costs, to which the plaintiff excepts'.

"Is hereby modified so as to read:

"This cause having heretofore been submitted it is Ordered, that the plaintiff's suit be dismissed, each party to pay his own costs; and as so modified the decree is hereby re-entered as of this date, to all of which plaintiff excepts.

Filed May 2, 1928, R. C. Hoyt, Clerk.

"By the Court

THOS. C. MUNGER, Judge."

May 2-1928.

To all of which the plaintiff at the time duly excepted.

Dated this second day of May, 1928.

JAMES C. KINSLER,
United States Attorney,
Attorney for Plaintiff.

Endorsed: Filed May 1, 1928, R. C. Hoyt Clerk.

Endorsed: Refiled May 2, 1928, R. C. Hoyt, Clerk.

111 Petition for Appeal.

Now comes the complainant, United States of America, by James C. Kinsler, United States Attorney for the District of Nebraska, and complainant, conceiving itself aggrieved by the final order, judgment or decree made and entered April 13, 1928, in the above entitled cause dismissing complainant's suit and reading as follows:

"Order"

This cause having heretofore been submitted, it is ordered that the plaintiff's suit be dismissed at plaintiff's costs, to which the plaintiff excepts.

THOS. C. MUNGER."

and by said final order, judgment or decree as modified by the Court May 2, 1928 and reading as follows:

"Order"

"The order and decree heretofore entered in this case on Apil 13, 1928, which reads as follows:

'This cause having heretofore been submitted, it is Ordered, that the plaintiff's suit be dismissed, at plaintiff's costs, to which the plaintiff excepts.'

"Is hereby modified so as to read:

'This cause having heretofore been submitted it is Ordered, that the plaintiff's suit be dismissed, each party to pay his own costs; and as so modified the decree is
112 hereby re-entered as of this date, to all of which plaintiff excepts.

By the Court,

THOS. C. MUNGER, Judge."

May 2-1928.

does hereby appeal from said final order, judgment or decree of this Court, original and as modified and re-entered to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons specified in the Assignment of Errors which is filed herewith, and complainant prays that this appeal may be allowed and that a citation may be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said final order, judgment or decree of this Court was made, duly authenticated, may be sent to

said United States Circuit Court of Appeals for the Eighth Circuit.

Dated this first day of May, 1928.

JAMES C. KINSLER,
United States Attorney,
Attorney for Complainant.

Endorsed: Filed May 1, 1928, R. C. Hoyt, Clerk.

Endorsed: Filed May 1, 1928, R. C. Hoyt Clerk.

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113 Order Allowing Appeal.

Upon reading the Petition of complainant, United States of America, dated May 1, 1928, for the allowance of an appeal herein and on consideration of the Assignment of Errors presented therewith, including Assignment 23 made this second day of May, 1928.

Ordered that the appeal as prayed for be and it is hereby allowed and that a certified transcript of the record and proceedings be forthwith transmitted to the United States Circuit Court of Appeals for the Eighth Circuit, and it appearing that this appeal is taken by direction of a department of the Government, to-wit, the Department of Justice, it is further

Ordered that the said appeal shall operate as a supersedeas and that no bond, obligation or security shall be required from the appellant, United States of America, either to prosecute said appeal or to answer in damages or cost.

Dated this 2nd day of May, 1928.

By the Court

THOS. C. MUNGER,
United States District Judge.

Endorsed: Filed May 2, 1928. R. C. Hoyt, Clerk.

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114 Notice of Lodgment of Statement of Evidence.

The above named defendants and their attorneys will take notice that complainant has lodged a "Statement of Evidence" for the Transcript of the Record on appeal to the United States Circuit Court of Appeals for the Eighth Circuit in the above entitled cause in the office of the Clerk of said United States District Court for the District of Nebraska, Omaha division, for your examination.

And you are further notified that Complainant will present said matter to the Court and ask the Court to examine and approve said "Statement of the Evidence" at half past 10 o'clock in the forenoon of the 14th day of May, 1928, or as soon thereafter as counsel for complainant can be heard.

JAMES C. KINSLER,
United States Attorney,
Attorney for Complainant.

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115 District of Nebraska—ss.

I hereby certify and return, that on the 2nd day of May 1928, I received this Notice of Lodgment of Statement of Evidence, and on the 2nd day of May 1928, I served the same upon the within-named Warren H. Howard, Attorney for the defendant George A. Roberts, at Omaha, in Douglas County, State, and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

D. H. CRONIN.
United States Marshal for the
District of Nebraska.
By J. A. Davis,
Deputy United States Marshal.

District of Nebraska—ss.

I hereby certify and return, that on the 2nd day of May, 1928, I received this Notice of Lodgment of Statement of Evidence, and on the 3rd day of May, 1928 I served the same upon the within-named defendant Ed. P. Smith, Attorney for himself, at Omaha, in Douglas County, State and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

D. H. CRONIN,
United States Marshal for the
District of Nebraska.
By J. A. Davis,
Deputy United States Marshal.

---

116 District of Nebraska—ss.

I hereby certify and return that on the 2nd day of May, 1928, I received this Notice of Lodgment of Statement of Evidence and on the second day of May, 1928 I served the

same upon the within-named Brogan, Ellick and Raymond, Attorneys of record for all the defendants named in the caption of said Notice of Lodgment of Statement of Evidence with the exception of the defendants, Ed. P. Smith and George A. Roberts, by delivering a certified copy of said Notice of Lodgment of Statement of Evidence to Francis A. Brogan, Senior Member of said Law Firm at his office in the First National Bank Building in the City of Omaha, County of Douglas, State and District of Nebraska.

D. H. CRONIN,
United States Marshal for the
District of Nebraska.
By J. A. Davis,
Deputy United States Marshal.

Endorsed: Filed May 3, 1928, R. C. Hoyt, Clerk.

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117 Citation.

United States District Court, District of Nebraska, Omaha Division.

United States of America, Complainant and Appellant.
Number 853 vs. Equity
Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart, Jos. P. McGrath, Ed P. Smith and George A. Roberts, Defendants and Appellees.

United States of America to Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart, Jos. P. McGrath, Ed P. Smith and George A. Roberts—Greeting:

You and each of you are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal, filed in the Clerk's office of the District Court of the United States for the District of Nebraska, Omaha division, wherein United States of America is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and
118 why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Judges of the District Court of the United States for the District of Nebraska, this 2nd day of May, 1928.

THOS. C. MUNGER
United States District Judge,
District of Nebraska.

District of Nebraska—ss:

I hereby certify and return, that on the 2nd day of May 1928, I received this Citation, and on the 3rd day of May, 1928, I served the same upon the within-named defendant, Ed. P. Smith, Attorney for himself, at Omaha, in Douglas County, State, and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis
Deputy United States Marshal.

District of Nebraska—ss:

I hereby certify and return, that on the 2nd day of May 1928, I received this Citation, and on the 2nd day of May 1928, I served the same upon the within-named Warren H. Howard, Attorney for the defendant George A. Roberts, at Omaha, in Douglas County, State, and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis
Deputy United States Marshal.

District of Nebraska—ss:

I hereby certify and return that on the 2nd day of May, 1928, I received this Citation and on the second day of May, 1928, I served the same upon Brogan, Ellick and Raymond, Attorneys of record for all the defendants named in the caption of said Citation with the exception of the defendants, Ed P. Smith and George A. Roberts, by delivering a certified copy of said Citation to Francis A. Brogan, Senior member of said Law Firm at his office in the First National Bank Building in the City of Omaha, County of Douglas, State and District of Nebraska.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis.
Deputy United States Marshal.

Endorsed: Filed in U. S. District Court on May 3, 1928.

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119 Notice of Appeal

United States District Court, District of Nebraska, Omaha Division.

United States of America, Complainant and Appellant,
Number 853 vs. Equity
Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo. Hamilton, A. P. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey, real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart, Jos. P. McGrath, Ed P. Smith and George A. Roberts, Defendants and Appellees.

The above named defendants and their attorneys will take notice that the complainant, United States of America, appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the final order, judgment or decree of the trial court made and entered herein April 13, 1928, dismissing complainant's suit and reading as follows:

"Order"

"This cause having heretofore been submitted it is ordered that the plaintiff's suit be dismissed at plaintiff's costs, to which the plaintiff excepts.

THOS. C. MUNGER, Judge."

That complainant's said appeal is taken for the purpose of reviewing the proceedings at the trial of complainant's said suit and for the purpose of reversing said final order, judgment or decree of the trial court from which this appeal is taken, and for the further purpose of having a decree rendered in accordance with the prayer of complainant's amended bill of complaint.

120 You are further notified that in prosecuting this appeal complainant will rely on assignment of errors filed in the office of the Clerk of said Court in which this action is pending.

And you and each of you are hereby further notified to be and appear in said United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the date of this notice of appeal, to show cause, if any there be, why said final judgment, order, or decree appealed from should not be corrected and why speedy justice should not be done the parties in that behalf.

Dated this 1st day of May, 1928.

JAMES C. KINSLER
United States Attorney,
Attorney for Complainant.

District of Nebraska—ss:

I hereby certify and return, that on the first day of May, 1928, I received this Notice of Appeal, and on the second day of May, 1928 I served the same upon the defendant, Ed P. Smith, Attorney for himself, at Omaha, in Douglas County, State, and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis
Deputy United States Marshal.

District of Nebraska—ss:

I hereby certify and return, that on the first day of May, 1928 I received this Notice of Appeal, and on the first day of May, 1928, I served the same upon [the] Warren H. Howard, Attorney for the defendant George A. Roberts at Omaha, in Douglas County, State, and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis
Deputy United States Marshal.

District of Nebraska—ss:

I hereby certify and return that on the first day of May, 1928, I received this Notice of Appeal and on the first day of May, 1928, I served the same upon Brogan, Ellick and Raymond, Attorneys of Record for all of the defendants named in the caption of said Notice with the exception of the defendants, Ed P. Smith and George A. Roberts, by delivering a certified copy of said Notice to Francis A. Brogan, Senior member of said Law Firm at his office in the First National Bank Building in the city of Omaha, County of Douglas, State and District of Nebraska.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis
Deputy United States Marshal.

Endorsed: Filed in U. S. District Court on May 3, 1928.

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121 Notice of Appeal.

United States District Court, District of Nebraska, Omaha Division.

United States of America, Plaintiff and Appellant,
Number 853 vs. Equity
Nelson B. Updike, Metta E. Updike, N. B. Updike, Jr., Hazel Updike Reasoner, Edward Updike, Robert B. Updike, Gorton Roth, Eva T. Roth, Otis M. Smith, Joy M. Hackler, F. B. Johnson, Winnifred S. Updike, Lucy Updike, L. Claude Hamilton, F. C. Bell, R. Earl Miller, Jo Hamilton, A. T. Murtagh, Frank R. O'Neil, Henry Figard, Chas. Zinkey, J. A. Dickinson, A. S. Tobey,

real name S. A. Tobey, Victoria Samuels, Thomas Wolfe, E. Stockham, Charles Figard, S. S. Garvey, Alex T. Hart, Jos. P. McGrath, Ed P. Smith and George A. Roberts, Defendants and Appellees.

The above named defendants and their attorneys will take notice that the plaintiff, United States of America, appeals to the United States Circuit Court of Appeals for the Eighth Circuit from the final order, judgment or decree of the trial court made and entered herein April 13, 1928, dismissing plaintiff's suit and reading as follows:

"Order"

"This cause having heretofore been submitted it is ordered that the plaintiff's suit be dismissed at plaintiff's costs, to which the plaintiff excepts.

THOS. C. MUNGER, Judge."

and from the order of said Court made and entered herein May 2, 1928, modifying and re-entering said final order, judgment and decree and reading as follows:

"Order"

"The Order and decree heretofore entered in this case on April 13, 1928, which reads as follows:

'This cause having heretofore been submitted, it is Ordered, that the plaintiff's suit be dismissed, at plaintiff's costs, to which the plaintiff excepts.'

"Is hereby modified so as to read:

122 "This cause having heretofore been submitted, it is Ordered, that the plaintiff's suit be dismissed, each party to pay his own costs; and as so modified the decree is hereby re-entered as of this date, to all of which plaintiff excepts.

By the Court,

THOS. C. MUNGER,

May 2-1928 Judge"

That plaintiff's said appeal is taken for the purpose of reviewing the proceedings at the trial of plaintiff's said suit and for the purpose of reversing said final order, judgment or decree of the trial court as modified and re-entered May 2, 1928, from which this appeal is taken, and for the further purpose of having a decree rendered in accordance with the prayer of plaintiff's amended bill of complaint.

You are further notified that in prosecuting this appeal plaintiff will rely on assignment of errors refiled in the office of the Clerk of said Court in which this action is pending May 2, 1928, and on Assignment No. 23 filed May 2, 1928.

And you and each of you are hereby further notified to be and appear in said United States Circuit Court of Appeals for the Eighth Circuit at the City of St. Louis, Missouri, sixty days from and after the date of this notice of appeal, to show cause, if any there be, why said final judgment, order or decree appealed from, as modified and reentered May 2, 1928, should not be corrected and why speedy justice should not be done the parties in that behalf.

Dated this 2nd day of May, 1928.

JAMES C. KINSLER,
United States Attorney,
Attorney for Plaintiff.

District of Nebraska—ss:

I hereby certify and return, that on the 2nd day of May, 1928, I received this Notice of Appeal, and on the 2nd day of May 1928, I served the same upon the within-named Warren H. Howard, Attorney for the defendant George A. Roberts, at Omaha, in Douglas County, State and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis
Deputy United States Marshal.

District of Nebraska—ss:

I hereby certify and return that on the 2nd day of May, 1928, I received this Notice of Appeal, and on the 3rd day of May 1928, I served the same upon the within-named defendant Ed P. Smith, Attorney for himself, at Omaha, in Douglas County, State, and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis
Deputy United States Marshal.

District of Nebraska—ss:

I hereby certify and return that on the 2nd day of May, 1928, I received this Notice of Appeal and on the second day

of May, 1928, I served the same upon Brogan, Ellick and Raymond, Attorneys of record for all the defendants named in the caption of said Notice of Appeal with the exception of the defendants, Ed P. Smith and George A. Roberts, by delivering a certified copy of said Notice to Francis A. Brogan, Senior Member of said Law Firm at his office in the First National Bank Building in the City of Omaha, County of Douglas, State and District of Nebraska.

D. H. CRONIN
United States Marshal for the
District of Nebraska.
By J. A. Davis
Deputy United States Marshal.

Endorsed: Filed in U. S. District Court on May 3, 1928.

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123 Statement of Evidence.

Be It Remembered, that at a regular term of the United States District Court for the District of Nebraska, Omaha Division, held at Omaha, Nebraska, on March 26, 1928, Honorable Thomas C. Munger, United States District Judge, presiding, the above entitled action was called for trial and the trial thereof was commenced on said twenty-sixth day of March, 1928, and continued until March 28, 1928, when it was concluded and the case duly submitted to the Court.

James C. Kinsler, United States Attorney, Sewall Key, Special Assistant to the Attorney General of the United States, and I. R. Blaisdell, Special Attorney for the Bureau of Internal Revenue of the United States, appeared as counsel for complainant.

Brogan, Ellick and Raymond, Ed P. Smith and Warren Howard appeared as counsel for the defendants.

124 At which hearing the various parties respectively offered and introduced evidence, both oral and documentary, as hereinafter set forth; objections were made thereto, rulings were had on such objections and exceptions taken to such rulings respectively as follows:

Complainant's Evidence in Chief.

Examination

By Mr. Blaisdell:

Gorton Roth, complainant's first witness, being duly sworn, testified that he is now Secretary of Updike Grain

Corporation; that he was formerly and until the date of its dissolution during the month of August, 1917, Secretary of Updike Grain Company, a Nebraska corporation, "the one that is mentioned in this law suit". The name Gorton Roth signed to the letter, Exhibit number 1, is the signature of witness. Witness sent this letter to the Collector of Internal Revenue at Omaha, Nebraska, on or about March 26, 1918.

Complainant offered in evidence Exhibit number 1 which is blank corporation income return mailed to the Collector of Internal Revenue, Omaha, Nebraska, by Gorton Roth under date of March 26, 1918—this exhibit constitutes both the blank income tax return and the letter attached thereto.

Exhibit number 1 was offered and received in evidence without objection, and is as follows: one photostat showing Exhibit number 1 with attached letter of witness folded, the second photostat showing Exhibit number 1 with attached letter of witness open, and the third photostat showing the back or reverse side of Exhibit number 1.

Supplemental 11 Mos 6/30/17

CAUTION

...d this form and all ta... ...ions carefully and fill ... ...plementary statement ... ...back of return first. ...totals in supplementary ...tatement must agree with ...totals on face of return.

Form 1031 (Revised January, 1918).—UNITED STATES INTERNAL REVENUE

CORPORATION INCOME TAX RETURN

(FOR ALL CORPORATIONS EXCEPT RAILROAD AND INSURANCE COMPANIES)

Return of annual net income for the [calendar year 1917. / fiscal year ending ..... 19....]

(Do not write in this space.)
RECEIVED
MAR 30 1918
LIST.
Page. Line.
Audited by

Name of corporation Updike Grain Company.

Principal office 603 Grain Exchange Building, Omaha, Nebraska.

Kind of business carried on

Date of organization Aug. 21, 1899.

1. Total amount of paid-up capital stock outstanding at the close of the year or if there is no capital stock the capital using that interest-bearing indebtedness employed in the business during the year (see item 7 on back of return)

(a) Paid-up common stock $

(b) Paid-up preferred stock

...the State of Nebraska, not to be ... 1917 and did ... 27, 1917, on which date the Company was duly dissolved in pursuance of the laws of the State of Nebraska, and since said date the said corporation has not been in existence. Prior to the dissolution of said Company in pursuance of Article 65 of the Income Tax Regulations, then in full force and effect as supplemented by ruling of the Acting Commissioner of Internal Revenue under date of March 22nd, 1917, the said corporation retained from its assets and paid federal income tax and excess profits tax for the fractional part

2. Total a... of th... sub... of in... subs...

3. (a) Gro...

(b) Inco...

(c) Income from interest (see item 8 on back of return)

(d) Income from dividends (see item 9 on back of return)

(e) Income from all other sources (see item 10 on back)

Total gross sales and other income

Less total deductions

8. Total net income

Less: (a) Excess profits tax (item 12 ...

(b) Dividends received (not ex... ings of 1913, 1914, 1915 ...

Total (a plus b)

9. (a) Amount taxable at 2%, (item 8 less ... total (a ...

(b) Amount taxable at 4% (item 8 ...

10. Amount of total net income shown in item ...

Less: (a) Excess profits tax (item 12 ... $

(b) Dividends received (not ex... ...

Total (a plus b)

11. Amount taxable at 4% (item 10 less total (a plus b)

If return is made for a full fiscal year ended in 1917, compute tax on as many twelfths of item 11 as there are months from January 1, 1917, to the close of the fiscal year. Enter amount taxable here

(d) Expenses charged off

(e) Losses sustained charged off

(f) Depreciation charged off

(g) Depletion charged off

(h) Interest paid (except as entered under (b) and ...

(i) Interest paid on deposits (for banks only)

(j) Interest paid on indebtedness wholly secured by collateral

7. (a) Domestic corporations, not including income and ex... ...cess profits taxes

(b) ...ign taxes paid

...l deductions

TAX

12. Amount of excess profits tax (see instructions below)

13. Amount at 2% tax (2% of item 9a)

14. Amount at 4% tax (4% of item 9b)

15. Amount at 4% tax (4% of item 11)

16. Total tax assessable

We, the undersigned, president and treasurer of the above-named company, whose return of net income is herein set forth, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in the supplementary statement and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief, true and correct in each and every particular.

Sworn to and subscribed before me this ..... day of ....., 19.....

Seal of officer taking affidavit.

President.

Treasurer.

GENERAL INSTRUCTIONS.

Excess profits tax. ... the purpose of the excess profits tax every corporation subject to income tax shall be deemed to be engaged in business, and all the trades and businesses in which ... shall be ... trades or businesses, and all its gross income from whatever source derived shall be deemed to be received from ...

... That ... the excess profits tax is equivalent to 8 percent of the net income in excess of $3,000. ... which the employment of capital is not necessary and the earnings of which are to be ascribed ... principles ...

... invested capital, the excess profits tax is equal to various percentages of the net income, depending on its ratio to the invested ... the corporation must make a return of its invested capital and compute the amount of tax on Form 1103.

... Regulations No. 41 ... the War Excess Profits Tax. A copy can be obtained from any collector of internal revenue.

Time of filing ... on or before March 1 ... collector of internal revenue of the district in which is located the principal ...

... a FISCAL YEAR, they must be filed within sixty days after the close of such year.

... other than the calendar year must, not less than 30 days prior to March 1 of the year in which ... the collector a notice in writing designating the last day of some month as the close of such fiscal year. A return ... close of the fiscal year must be filed on or before the first day of March of the next calendar year, and the return ... within sixty days after the closing date of the fiscal year so established.

Extension of ... within the period ... time, the collector is authorized to grant an extension of the filing period not exceeding 30 days from the ... application for such extension is made in writing prior to the expiration of the period for which ... further extension as he may deem proper.

Signatures ... by two officers of the corporation, that is, by the president, vice president, or other principal officer, and the treasurer ... authorized to administer oaths, and the seal of the attesting officer, if he is required to have a seal, must be impressed on the return ...

Subsidiary companies. The corporation making this return must attach hereto a list of all its subsidiary companies, if any, with the location of the principal place of business of each. ... separate and distinct return.

Foreign corporations. ... to the law are required to make returns to the collector of the district in which is located the principal place of business or agency through which it ... the United States, or if the corporation has no place of business or agency in the United States, its return will be filed with the collector of internal revenue at ... The gross income to be returned is that received from business transacted and capital invested in the United States, including interest on bonds, notes ... of residents, corporate or otherwise, and including income derived from dividends on capital stock or from net earnings of resident corporations, ... whose net income is taxable under this law. The deductions allowable are those losses and disbursements incident and necessary to the transaction ... specifically set out in the Act. Foreign taxes are not deductible from the gross income arising and accruing to a foreign corporation from business ... If a foreign corporation has no place of business or agency in the United States and no return is made, the tax on income from interest ...

Penalties. ... within the time prescribed by law or rendering false or fraudulent returns shall be liable to a penalty of not exceeding $10,000, ... in case of neglect to file the return within the time prescribed by law, and 100 per cent in the case of a false or fraudulent return, shall be added to the ... agency, if the return is voluntarily filed without notice from the collector, and it is shown that delay in filing was due to reasonable cause ... tax will not be assessed. A statement of the cause of delay must be attached to each delayed return.

Any ... who fails to make, render, sign, or verify any return who makes any false or fraudulent return or statement with intent to defeat or evade the assessment required to be made shall be guilty of a misdemeanor, and shall be fined not exceeding $2,000 or be imprisoned not exceeding one year, or both, at the discretion of the court, with the ... prosecution.

Supplemental 11 mo. 6/30/17

CAUTION

...d this form and all in-
...tions carefully and fu
...pplementary statement
...ck of return first.
...ils in supplementary
...ment must agree with
... on face of return.

...me of corporation
...ncipal office
...d of business carried on

...Total amount of pa...
...to capital stock the...
...the business at the...
...cluded in this ...
...the year for w...

Form 1031 (Revised January 1918) UNITED STATES INTERNAL REVENUE

CORPORATION INCOME TAX RETURN

FOR ALL CORPORATIONS EXCEPT RAILROAD AND INSURANCE COMPANIES

Return of annual net income for the calendar year 1917
fiscal year beginning ..... 19 ... ending ..... 19 ...

(Do not write in this space.)
RECEIVED
...
Audited by
Entered
Page. Line.

Name of corporation: Updike Grain Company,
Principal office: 603 Grain Exchange Building, Omaha, Nebraska.
Kind of business carried on:

Date of organization Aug. 21, 1899.

...Total amount of paid in capital stock (common) ...
...Total amount of paid in capital stock (preferred) ...
...Total amount of bonds issued ...
...Total amount of indebtedness ...
...Total amount of the assets ...
...Total amount of the liabilities ...
...Total amount of the surplus ...
...Total amount of the undivided profits ...
...Total amount of the net income ...
...Total amount of the dividends ...
...Total amount of the interest ...
...Total amount of the rent ...
...Total amount of the taxes ...
...Total amount of the depreciation ...
...Total amount of the depletion ...
...Total amount of the amortization ...
...Total amount of the bad debts ...
...Total amount of the reserves ...
...Total amount of the contingencies ...
...Total amount of the miscellaneous ...

Not Consolidated
Consolidated return filed
Approved ... Chief of Section

Omaha, Nebr., March 26, 1918.

To the Collector of Internal Revenue,
for the District of Nebraska,
Omaha, Nebraska.

Dear Sir:-

The Updike Grain Company was organized under the laws of the State of Nebraska August 21, 1899 and did business up to August 27, 1917, on which date the Company was duly dissolved in pursuance of the laws of the State of Nebraska, and since said date the said corporation has not been in existence. Prior to the dissolution of said Company in pursuance of Article 56 of the Income Tax Regulations, then in full force and effect, as supplemented by ruling of the Acting Commissioner of Internal Revenue under date of March 22nd, 1917, the said corporation retained from its assets and paid federal income tax and excess profits tax for the fractional part of the year 1917, such payments being made in pursuance of the final return duly made and filed in accordance with said rulings.

Prior to the said dissolution of said corporation all of the indebtedness of the said corporation was liquidated and paid in full, and at the time of said dissolution the said corporation had no indebtedness whatsoever outstanding or unpaid and had no creditors.

At the time of said dissolution a final distribution of all of the assets of said corporation was made, and all of said assets were paid as a final dividend to stockholders, such payment being made in accordance with the law of the State of Nebraska. Since said payment the said corporation has not been in existence, nor is there in existence any money or other property of said corporation, nor are there any officers, directors or stockholders.

I am addressing this communication to you because I held the position of Secretary of said corporation prior to its dissolution, and because I am aware of regulation known as Article 61 of the regulations in reference to the income tax Act of October 3rd, 1917 (but which I am advised is erroneous), and in order that a statement of the facts in this matter may be made for your records.

Yours truly,

...

...

SUPPLEMENTARY STATEMENT

The following information must be furnished, either on the blanks or on [illegible] by every corporation, joint-stock company, association, or insurance company. Without such information the return will not be accepted as complete. The items below relate to the correspondingly numbered items on page 1 of this form.

3. (c) FROM INTEREST.

Interest to be reported as income for the purpose of the income tax includes all interest received on bonds or securities owned by the corporation, except interest on obligations of a State or political subdivision thereof or interest upon the obligations of the United States or its possessions.

3. (d) FROM DIVIDENDS RECEIVED.

Any distribution made or ordered to be made by a corporation out of its earnings or profits accrued since March 1, 1913, whether in cash or stock of the paying company, must be returned (under Item 3 (d) on front page of this form) by the receiving corporation as income of the year in which the distribution was made or ordered to be made and will be taxed at the rates prescribed by law for the year in which surplus or profits distributed were earned, viz, 1% on amounts received out of earnings of 1913 (subsequent to March 1, 1913), 1914, and 1915, and 2% on amounts received from earnings of 1916 and 1917. A statement from the corporation paying the dividends included herein should be attached to this return, showing separately the amount of dividends paid out of earnings of each year; otherwise, they will be deemed to have been paid out of the earnings of 1917 and will be taxed 2%. The receiving corporation, in order that tax may be computed on dividends received in 1917 at the rates applicable to the years in which the profits were earned, must fill in the following form:

Dividends received in 1917 out of profits earned each year subsequent to March 1, 1913					
1913	1914	1915	1916	1917	Total
$	$	$	$	$	$

3. (e) FROM OTHER SOURCES.

	$
Total	$

4. (a) COST OF GOODS AND OTHER PROPERTY SOLD.

Report the cost of goods sold in the following form:

Merchandise bought for sale	$	
Cost of labor, supplies, or other items producing goods not separately shown on books). (Submit schedule showing principal items of cost)		
Plus inventories at beginning of year		
Total	$	
Less inventories at end of year		
Net cost of goods sold		$

Explanations

If the corporation makes inventories of merchandise or materials, explain the basis on which they are made, whether (a) at cost, or (b) at cost or market value, whichever is lower, and (c) [illegible] relating to inventories, but report [illegible] or purchased during the year. If the cost of manufacturing [illegible] not kept separate from general expenses in the corresponding [illegible] in "Expenses, general," below.

[illegible] year should report the cost of the property sold in the [illegible]

1. Original cost of property	$
2. Market value March 1, 1913, if acquired before that date	
3. Cost of subsequent improvements, if any	
4. Depreciation and depletion to date of sale	
5. Net cost (Item 1 or Item 2 plus Item 3 minus Item 4)	

State how market value March 1, 1913, was determined

Does such value include any good will? If so, how much? $

4. (b) EXPENSES, GENERAL.

This item should include only the ordinary and necessary expenses paid within the year in the operation of the business and maintenance of the property of the corporation, itemized as per schedule below. It must not include any expenditures reported under 4 (a), 5, 6, or 7.

Expenditures for incidental repairs which do not add to the value or appreciably prolong the life of property are deductible as expenses, but expenditures for new buildings, permanent improvements or betterments which increase the value of property, or for restoring or replacing property, are not deductible under this or any other item of the return. Such expenditures are properly chargeable to capital account, to be extinguished through annual depreciation charges.

Payments made to officers or employees, who are stockholders, in the guise of salaries or compensation, the amount of which is based upon the stockholdings of such officers or employees, are not deductible as a business expense.

1. Salaries of officers	$
2. Labor, wages, commissions, etc. (not included in cost of manufacturing or otherwise producing goods" under 4 (a))	
3. Rents, royalties, and other payments in lieu of rent	
4. Repairs, ordinary and incidental	
5. Other expenditures (itemize)	
Total expenses	$

If salaries were increased or extra compensation was paid to officers, state the amount, the reason therefor, and the basis on which computed

5. (c) LOSSES.

Losses deductible under this item must be distinguished from depreciation or allowances for exhaustion, wear, and tear. The losses, not compensated by insurance or otherwise, must be absolute, complete, actually sustained during the year, and charged off on the books of the corporation.

Kind of property on which loss is claimed	Cost of property.	Cause of loss.	Amount charged off within year.
			$
			$

Reverse of back of p. 1

When were the deducted losses ascertained to be such?

How were they so ascertained?

The cost of property lost should be determined as indicated in Item 4 (a).

A bad debt offsetting income accrued since January 1, 1913, will not be allowed as a deduction unless the amount was reported as income for the year in which the debt was created.

State how the debts charged off (if any) were ascertained to be worthless

If at any future time a debt charged off as worthless is collected the amount collected must be returned as income for the year in which received.

Capital debts are not deductible if made good by recovery of property sold or retention of property pledged.

5. (b) DEPRECIATION.

The [illegible] deductible on account of depreciation is an amount *charged off* which fairly represents the [illegible] during the year in the value of physical property by reason of exhaustion, wear, and tear. Such amount should be determined upon the basis of the *cost* of the property and the probable number of years constituting its life. Stocks, bonds, and like [illegible] intangible assets, are not subject to exhaustion, wear, and tear [illegible] Reserves for any amount charged off as representing a [illegible] deductible either as depreciation or as a loss.

Depreciation computed on [illegible] value of merchandise in stock is not an allowable deduction by reason of [illegible] since the merchandise is unsalable.

If deduction is made on account of depreciation, the following statement must be filled [illegible]

Kind of property.	Cost or other basis.	Probable life after acquirement.	Amount of depreciation charged off.	
			This year.	Previous years.
			$	$
			$	$

If building, [illegible] of which constructed.

5. (c) DEPLETION.

The [illegible] contemplates a [illegible] to return [illegible] or in case of purchase prior to [illegible] 1913, to the extent [illegible] market price [illegible] such date. An allowance [illegible] on account of depletion [illegible] excess [illegible] March 1, 1913, or the cost [illegible] to that date, of the product mined and sold during the year, and will be [illegible] in accordance with the rule set out in Articles 170 to 173, Regulations 33, Revised. The amount sought to be deducted as this account must be charged off on the books of the company.

Kind of property.	Cost [illegible] acquirement to March 1, 1913.	Fair [illegible] value as of March 1, 1913.	Amount of depletion charged off.	
			This year.	Previous years.
	$	$	$	$

* Coal, iron, or [illegible]
† State how [illegible]

6. INTEREST PAID.

(a) The amount of interest deductible under (a) is the amount actually paid within the year on an amount of bonded or other indebtedness (except on indebtedness falling under c (5) or 6 (c)) as [illegible] indebtedness incurred for the purchase of [illegible] securities the income from which is exempt from income tax) not in excess of the paid-up capital stock outstanding at the close of the year, or if there is no capital stock, the entire amount of capital [illegible] including interest-bearing indebtedness employed in the business at the close of the year, plus, in each case, one-half of the interest-bearing indebtedness also then outstanding.

Capital employed in the business, as here used, contemplates the entire capital paid in by the members of the company, including so much of the accumulated surplus as is actually employed in the business, but does not include any borrowed capital or interest-bearing indebtedness.

(b) Interest paid [illegible] on deposits or on money received for investment and secured by interest-bearing [illegible] of indebtedness issued by a bank, banking association or [illegible] or [illegible] is allowable in the entire amount so paid.

[illegible], or any part thereof, is wholly secured by collateral [illegible] corporation in the corporation's ordinary [illegible] the interest paid on an amount of such [illegible] may be deducted.

[illegible] is paid in the following form. Distinguish [illegible] or [illegible] obligations incurred for the purchase of [illegible] from [illegible]

Form of obligation	Amount of principal	Rate of interest	Amount of interest paid
	$		$
	$		$

7. TAXES PAID.

Taxes paid or accrued on the books of the corporation during the taxable year, are deductible [illegible] following exceptions: Federal income and excess profits taxes (including [illegible] paid on the interest on its own obligations in pursuance of a covenant contained therein relieving the holder of liability for such taxes), foreign taxes on income derived from sources within the United States by foreign corporations, local taxes specially assessed against property on account of benefits accrued from public improvements or betterments, and taxes upon the corporation's capital stock in the hands of the stockholders.

BASIS OF RETURN.

Is this return made on the basis of actual receipts and disbursements?

If not, describe fully what other basis or method was used in computing net income

UNDISTRIBUTED INCOME, SURPLUS, AND UNDIVIDED PROFITS.

Total net income of taxable year preceding that for which this return is made (less income tax paid thereon)	$
Amount of such income remaining undistributed six months after the close of that year	
Amount of such income remaining undistributed twelve months after the close of that year	
Total surplus and undivided profits at close of taxable year	

If sufficient space is not provided for the entry of any information required in the "Supplementary Statement," schedules in the form indicated, marked with the number of the item to be explained, should be attached to this form.

128 Cross-Examination

By Mr. Ellick:

Exhibit 1 (without the letter attached) was received through the United States mail without any accompanying letter; no one connected with the Internal Revenue Department of the United States government ever made any demand that a return be filed on that form; or that a return be made or filed upon a form additional to the returns that witness made for the company in July, August and September, 1917. In connection with the company's attorney, Mr. Ed P. Smith, witness was handling all tax matters for Updike Grain Company during the years 1917 and 1918; and made up the return jointly—witness never received any notice of any kind from the government that he was required to file a return in addition to the returns that he had filed in July, August and September, 1917 and the return he filed in January, 1918; nor did Updike Grain Company ever receive any such notice.

Witness handled and saw all of the correspondence that was had between the Internal Revenue Department of the government and the Updike Grain Company with respect to their returns.

Examination

By Mr. Blaisdell:

LUTHER C. SMITH, complainant's second witness, being duly sworn, testified that his occupation is now and since June 16, 1918, has been that of Internal Revenue agent; that during the month of October, 1918, witness made an examination of the books and records of Updike Grain Company at its office in the Grain Exchange Building, Omaha; that witness was furnished with forms 7894 which were transcripts of the returns for 1913, 1914, 1915 and 1916, and had instructions to include the year 1917 in his examination.

129 Witness was not furnished, prior to making this examination, with a copy or copies of any returns filed by Updike Grain Company for the year 1917; nor with a synopsis on form 7894 of any return filed by Updike Grain Company for the year 1917.

In making this examination witness was acting under the directions of John J. Gillin, Revenue Agent in charge of the Omaha division and in charge of revenue agents like witness.

Witness examined the books and records of Updike Grain Company for the year 1917 to determine its tax liability for

the year 1917 and did so determine it—witness means for the fiscal period ending June 30, 1917.

From his examination of the books of Updike Grain Company for the 11-month fiscal period ending June 30, 1917, witness determined that corporation's net taxable income for that period.

Referring to his original written report made by witness at the time of his examination and containing the figures made as the result of his examination, witness testified that the net taxable income of Updike Grain Company for the fiscal period ended June 30, 1917, was $2,174,330.64.

Witness' examination was made for the purpose of determining the tax liability of Updike Grain Company arising or imposed by the Revenue Act of October 3, 1917.

Based upon his examination, from what he found out at that time, witness determined the tax liability of Updike Grain Company for the fiscal year ended June 30, 1917, imposed by the Revenue Act of October 3, 1917, to be $373,911.54.

At that time witness prepared or made up returns to be signed by Updike Grain Company and personally presented these returns to "Nelson B. Updike, the President, and I believe to Mr. Roth, the Secretary." They said the corporation had been dissolved and there were no officers with authority to sign the returns. They did not sign them.

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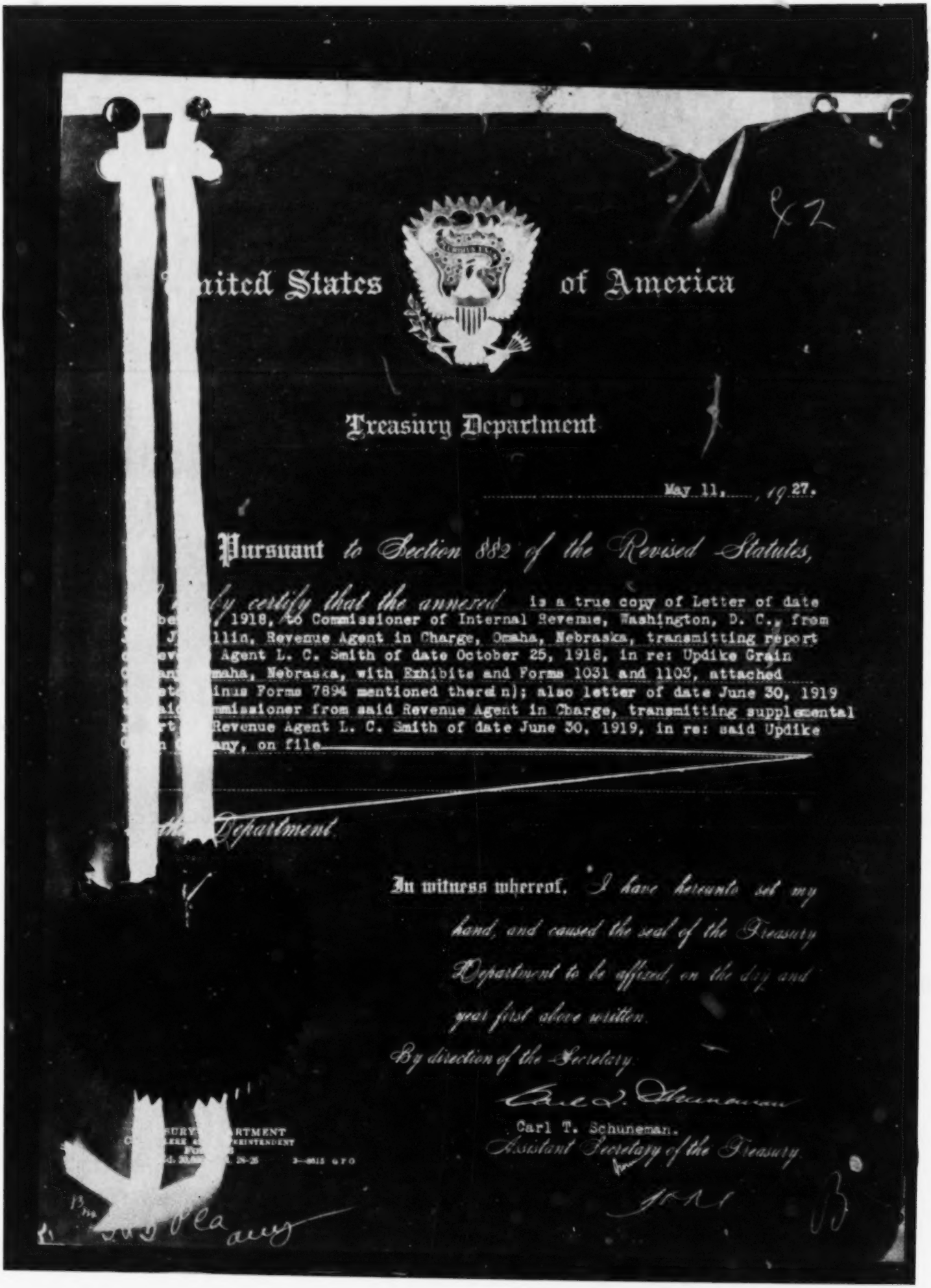
Asked whether they refused to sign them witness answered "Well, they refused in that way. They said they had no right to sign them".

Witness' attention was called to complainant's exhibit 2, being a certified photostatic copy of the Revenue Agent's report made by the witness, Luther C. Smith, and asked to examine particularly the copies of form 1031 and 1103 and state whether or not those are photostatic copies of blank forms of returns 1031 and 1103 which witness prepared in October, 1918, at the time of his examination of the books and records of Updike Grain Company and whether those are photostatic copies of the identical forms which witness presented to Mr. Updike and Gorton Roth, former officers of Updike Grain Company, for signature, to which witness answered "Yes sir, they are".

The court asked: "what is the date, about, when those were presented?", to which witness answered "October 25, 1918".

Exhibit 2 was offered and received in evidence without objections and is as follows:



United States of America

Treasury Department

May 11, 1927.

Pursuant to Section 882 of the Revised Statutes,

I hereby certify that the annexed is a true copy of Letter of date 1918, to Commissioner of Internal Revenue, Washington, D. C., from Revenue Agent in Charge, Omaha, Nebraska, transmitting report Agent L. C. Smith of date October 25, 1918, in re: Updike Grain Omaha, Nebraska, with Exhibits and Forms 1031 and 1103, attached (minus Forms 7894 mentioned therein); also letter of date June 30, 1919 Commissioner from said Revenue Agent in Charge, transmitting supplemental Revenue Agent L. C. Smith of date June 30, 1919, in re: said Updike any, on file

the Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary.

Carl T. Schuneman.
Assistant Secretary of the Treasury.

7-30-19

OFFICE OF
INTERNAL REVENUE AGENT
OMAHA DIVISION

Revenue Agents' Records Section
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
OMAHA, NEBR. June 30, 1919.

Supplemental
CT: UPDIKE GRAIN CO., Omaha, Neb.

REC. JUL 11 1919

Commissioner of Internal Revenue,
Washington, D. C.

I am in receipt of the attached supplemental report from Revenue Agent L.C. Smith, dated June 30,1919, relative to his report dated October 28, 1918, correcting the computation of additional tax for fiscal year ended June 30,1917.

There appears to be due from this company, additional tax of $8,346.93 over that reported October 28,1918.

Copy of this report furnished Collector Loomis for the Nebraska District.

MJW:AU

Agent in Charge

Supplemental 1917 Original Open 6-26-19

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OFFICE OF
INTERNAL REVENUE AGENT
OMAHA DIVISION

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR. June 30, 1919.

upplemental

UPDIKE GRAIN CO. Omaha.

[illegible]. Gillin, Esq.,
[illegible]evenue Agent in Charge
Omaha, Neb

[illegible]ear Sir:

[illegible]ith reference to my report dated October 25, 1918, relative to the tax liability of Updike Grain Co., Omaha, Neb., I have the honor to submit a supplemental report correcting the computation of additional tax for the fiscal year ended June 30,1917, (11 months period) as follows:

Net income revised,		$2,174,330.64
Less Excess profits tax		459,081.32
Amount subject to 2% tax		$1,715,249.32
Net income revised,		2,174,330.64
Less dividends $590,142.26		
" "	459,081.32	1,049,223.58
Balance		1,125.107.06
Subject to 4% tax,		613,694.75
Excess profits tax		459,081.32
Tax at 2%		34,304.99
Tax at 4%		24,547.79
Total tax liability - - - - -		517,934.10
Total tax paid - - - - - -		
Income tax $47,439.94		
Excess profits tax, 96,582.62		144,022.56
ADDITIONAL TAX - - - -		373,911.54
" " previously repo		365,564.61
ADDITIONAL TAX DUE,		8,346.93

Respectfully,
L. C. Smith, Revenue Agent.

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OFFICE OF
INTERNAL REVENUE AGENT
OMAHA DIVISION

OMAHA, NEBR. Oct. 26th, 1918.

OT MET In re: [illegible] COMPANY.
Omaha, Nebraska.

JUL 1 1919

Hon. Daniel C. Roper,
Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

I am in receipt of the attached report from Revenue Agent L. C. Smith, dated Oct. 5, 1918, on the subject of his investigation of the returns of annual net income of the [illegible] COMPANY, Omaha, Nebraska, for the year 1916 to 1917, inclusive, and also invested capital and income subject to Excess Profits tax for 1917.

I respectfully recommend that this corporation be assessed additional tax for 1915, $95.81; for 1916, $3094.70; and for 1917, $365,564.61. Total $368,755.12.

Forms 7894 for the years 1915 to 1916, inclusive, unsigned Form 1031, unsigned Form 1103, copy of letter dated March 26, 1918, from Morton Both to the Collector, and balance sheets as of June 30, 1916, and June 30, 1917, are enclosed herewith.

Copy of this report, together with Excess Profits Tax report, furnished Collector Loomis, Omaha, Nebraska.

Respectfully,

[signature]
Revenue Agent in Charge.

LJH:M

Encl.
Forms 7894 (4)
Form 1031
" 1103
Letter 3/26/18
Balance Sheets (2)

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OFFICE OF
INTERNAL REVENUE AGENT
OMAHA DIVISION

OMAHA, NEBR. Oct. 25th, 1918.

John J. Gillin, Esq.,
Revenue Agent in Charge,
Omaha, Nebr.

Dear Sir:

With reference to attached Forms 7894 (Revised) showing returns of net income for the years 1913, 1914, 1915 and 1916, filed by the Updike Grain Co., Omaha, Nebr., I have the honor to report that I visited the office of that corporation and made an investigation of its returns for the years 1913 to 1917, inclusive, returns for prior years having been investigated, and found additional tax liability and refunds due as follows:

	Additional Tax	Refund Due
1913		$258.25
1914		113.01
1915	$95.81	
1916	3094.70	
1917	365564.61	
Totals	$368,755.12	$371.26

Net due 368,383.86

This company was incorporated under the laws of the State of Nebraska, Aug. 19, 1899, with a paid up common stock of $500,000. The common stock was increased in 1906 to $1,000,000.00 and in 1917 it was again increased to $2,000,000.00.

The company was dissolved on Aug. 28, 1917.

On account of the inadequate system of accounting kept by this company, it was impossible to make a complete verification of any return filed, but from all books and records available, it appeared that the full amount of gross income for each year was reported and no improper deductions taken.

ADJUSTMENTS

In May 1914 this company was granted permission to make returns on the basis of a fiscal year ending July 31. After July 1914 the books

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closed annually on June 30, but it continued to make returns for the fiscal year ending July 31, using the gross income and deductions shown by the book closing of June 30. To make the figures of the returns conform to the fiscal year designated, the following adjustments were required.

1913 - Amended Return

Item 3		$105,126.03
4	$45,939.42	
6a	10,062.55	
7	697.66	56,699.63
Net Income		48,426.40
" " reported		74,251.38
Excessive net income reported		25,824.98
Refund due		258.25

No claim for refund

Differences:

The original return was for the period July 1, 1912, to July 1, 1913.

As the company had no permission at that time to render a return on the fiscal year basis, it was necessary to adjust the items of income and deductions, to the calendar year by deducting one half of the gross income and deductions reported, and adding the gross income and deductions from July 1 to Dec. 31, 1913.

Amended Return - Fiscal Year Ending July 31, 1914. (7 Months' Business)

Item 3		$38,918.16
4	$20,224.87	
6a	4,915.58	
7	593.67	25,734.12
Net Income		13,184.04
" " reported		24,484.64
Excessive net income reported		11,300.60
Refund due		113.01

No claim for refund

Differences:

The original return was for the period July 1, 1913, to July 31, 1914, instead of for the 7 months ending July 31, 1914. It was necessary to adjust the gross income and deductions to this basis using 7/13 of the items reported.

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Amended Return Fiscal Year Ending July 31, 1915.

Item 3		$442,295.00
4a	$156,617.18	
b	4,650.00	
5a	318.17	
b	37,473.30	
6a	45,583.63	
7	5,103.33	251,745.61
Net Income		190,549.39
" " reported		180,968.70
Additional net income		9,580.69
Additional tax		95.81

Differences:

The original return was for the period July 31, 1914, to June 30, 1915. It was necessary to adjust the income and deductions to the fiscal years designated, by adding the income and deductions for July 1915, determined by taking 1/12 of the gross income and deductions of the fiscal year book closing for the period from June 30, 1915, to June 30, 1916.

Amended Return Fiscal Year ending July 31, 1916

Item 3		$609,459.54
4	$190,278.95	
5a	930.38	
6a	53,794.47	
7	6,401.71	246,405.51
Net Income		363,054.03
" " reported		174,968.30
Additional net income		188,085.73
Tax 1%		3,530.54
Addl. Tax 2%		2,117.82
Total tax liability		5,748.36
" " paid		2,653.66
Additional tax due		3,094.70

There appears to be an error in the computation of the additional assessment at 2% shown on the abstract of return for this year.

Differences:

The original return was for the period June 30, 1915 to June 30, 1916. It was necessary to adjust the gross income and deductions to the fiscal year designated, by deducting the income and deductions for July 1915 and adding that of July 1916, determined by taking 1/12 of the total gross income and deductions as shown by the book closings for the fiscal years ending June 30, 1916 and June 30, 1917.

Copy of Return Fiscal Year Ending June 30, 1917

Item 1		$2,000,000.00
2		1,009,671.91
3a	$2,036,898.56	
c	56,252.36	
d	643,791.55	
e	116,657.66	2,853,600.13
4a	375,466.58	
5a	1,277.06	
6a	98,202.35	
7	6,657.09	481,603.08
Net Income		$2,371,997.05
Tax @ 2%		47,439.94

Amended Return Fiscal Year Ending June 30, 1917.

Item 1		$2,000,000.00
2		1,012,771.91
3a	$1,867,157.01	
c	51,564.67	
d	590,142.26	
e	106,936.19	2,615,800.13
4	344,177.70	
5a	1,170.64	
6a	90,018.82	
7	6,102.33	441,469.49
Net Income		$2,174,330.64
Less Dividends (3d)		590,142.26
Income less dividends		1,584,188.38
6/11 - 1917 proportion		864,102.75
Less Excess Profits Tax		459,081.32
Taxable at 4%		405,021.43
Excess Profits Tax		459,081.32
Income Tax @ 2%		34,304.99
" " @ 4%		16,200.86
Total tax liability		509,587.17
Total Tax paid		
Income tax	$47,439.94	
Ex. Profits Tax	96,582.62	144,022.56
Additional tax due		$ 365,564.61

2% tax on net income for fiscal period less 11/12 1917 portion.
Differences:

The original return included the business from June 30, 1916, to June 30, 1917, as per book closings of those dates. The end of the fiscal year was redesignated as June 30, and the company given permission to make return on that basis, and the return should have included only eleven months's business from July 31, 1916, to June 30, 1917. It was necessary to adjust the gross income and deductions to that period by eliminating the income and deductions for July 1916, determined by taking 1/12 of the total gross income and deductions of the book closing for the period June 30,1916, to June 30, 1917.

Copy Final Return for Period June 30, 1917 to Aug. 28, 1917.

Item 1		$2,000,000.00
2		645,521.91
3		57,244.66
4	$79,815.92	
5a	11,772.80	
6a	7,610.43	
7	1,430.50	100,629.65
Net Income		None

The books show an operating loss for that period, as reported.

On Aug. 28, 1917, the corporation was dissolved and all assets distributed to the stockholders, and the business has since been run as The Updike Grain Company (not incorporated), H. B. Updike, Owner.

In reply to a letter from the Collector of Internal Revenue for Nebraska, asking for amended returns for the year 1917, the enclosed letter (Exhibit A) was directed to his office by Gorton Roth formerly Secretary of the Updike Grain Co.

Amended returns and claims for refund covering adjustments, shown by this report, for the years 1915 to 1917, inclusive, could not be secured, as it was stated by the former secretary of the company that there were no officers of the company to execute same.

Unsigned amended returns for the fiscal year (11 months) ending June 30, 1917, are enclosed herewith.

H. B. Updike, formerly President of the Updike Grain Co. was advised of the differences found and the amount of additional tax resulting therefrom. He stated that it would be necessary to collect the tax from the individual stockholders at the time the company was dissolved, as no provision was made for the payment of this tax before the assets were distributed.

I list of stockholders on Aug. 28, 1917, the date of dissolution is enclosed herewith. (Exhibit B)

Respectfully submitted,

(Sgd) L. C. Smith
Revenue Agent

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Re: UPDIKE GRAIN COMPANY, Omaha, Nebraska. RPT.....1

In addition to verification of income tax returns of the UPDIKE GRAIN COMPANY, Omaha, Nebr., I have the honor to report that I made a careful examination of the books and records of this company for the purpose of preparing an Excess Profits Tax Return on Form 1108, as required by the Act of Oct. 3, 1917, and found as follows:

EXCESS PROFITS TAX SUMMARY.

Tax liability under Act Oct. 3, 1917,	$459,081.32
Tax paid under Act of March 3, 1917,	96,583.62
Additional tax due, ...	$362,498.70

This company was incorporated under the laws of the State of Nebraska, Aug. 19, 1899, with a paid-up common stock of $500,000. The stock was increased in 1906 to $1,000,000. fully paid up and in April, 1917, to $2,000,000. by a $1,000,000 stock dividends paid out of 1917 fiscal year earnings.

Invested capital for pre-war years and taxable year consisted of fully paid up capital stock and earned surplus, due allowance having been made on the books of the company for depreciation and losses sustained from date of incorporation to taxable year:

Copy Excess Profits Tax Return on Form 1095 under Act March 3, 1917.

Item 1			$2,100,844.05
2			6 months
3			2,371,997.05
Deductions:			
11/12 of $5,000.00	$4,583.33		
11/12 of 8% capital,	$154,081.90		158,645.23
4			2,213,351.82
Less 5/11			1,006,069.01
5			1,207,282.81
6			.08
7 Tax liability.			96,582.62

Re: Updike Grain Company,
Omaha, Nebraska. EPT.....2

Return for Fiscal year (11 months) ending 6p30-17

SYNOPSIS OF AMENDED RETURN.

	Invested Capital.	Net Income
1911	$1,101,771.11	$58,358.72
1912	1,007,324.06	5,367.47
1913	1,131,334.89	None
Totals,	$3,240,430.06	$63,726.19
1917,11/12	933,740.81	$1,584,188.38

Percentage of pre-war earnings to invested capital, 2 plus %
Percentage used in computing deduction, 7%
7% of 11/12 of invested capital taxable year, $65,361.86
11/12 of Specific deduction, 2,750.00
Total deductions, $68,111.86

Computation of Tax.

15% ------	$140,081.12	$68,111.86	$ 71,948.26	20%	$14, 389.65
15 to 20% --	46,687.04		46,687.04	25%	11,671.76
20 to 25% --	46,687.04		46,687.04	35%	16,340.46
25 to 33% ---	74,699.26		74,699.26	45%	33,614.67
over 33%	1,276,053.92		1,276,053.92	60%	765,632.35
Total,	$1,584,188.38	$68,111.86	1,516,076.52		$841,649.09

6/11 of tax for period Jan. 1 to June 30, 1917, $ 459,081.32

Difference in invested Capital.

Invested Capital, 1917 reported,	$2,100,644.05
Invested capital, 1917, revised,	1,018,826.34
Difference,	$1,082,217.71

Invested capital reported included $1,000,000 stock dividends issued April 30, 1917, out of fiscal year 1917 earnings, $1,000,000.00

Invested capital reported included average amount of stock in other companies in excess of average indebtedness, 278,694.13
Total excess, $1,278,694.13

Less July 1916 earnings, not included in invested, capital reported, 197,698.41
Net difference, $1,082,217.71

Re: Updike Grain Company,
Omaha, Nebraska. EPT.....3

An unsigned amended return on Form 1103 is enclosed herewith, as there are no officers of the Updike Grain Company to sign same, the company having been dissolved August 28, 1917..

It was impossible to prepare an accurate balance sheet as of July 31, 1916, and the balance sheet of June 30, 1916 is submitted herewith. To the surplus and undivided profits shown therein, is added the earnings for July, 1916, and the total is used in computing the invested capital at the end of the fiscal year ending July 31, 1916. An accurate balance sheet of June 30, 1917, is also enclosed.

(Signed)

L. C. Smith,

Revenue Agent.

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STATEMENT OF UPDIKE GRAIN COMPANY, at close of business, 6-30-17

Resources,		Liabilities,	
Cash on hand,	$3,593,255.75	Capital Stock,	$2,000,000.00
Grain on Hand and in Transit,	193,714.60	Surplus and Undivided profits,	192,721.60
Liberty Bonds,	150,000.00	Accts. Payable,	231.56
Board of Trade Memberships,	17,325.00	Bills Payable,	1,012,771.91
Bills Receivable,	59,454.68		
Accts Receivable,	480.00		
Elevators, plants, real estate, cribs, lumber & coal buildings, including terminal elevator at Lincoln, Neb.,	193,485.04		
	$3,205,715.07		$3,205,715.07

W.B. UPDIKE, President.

GORTON ROTH, Secretary.

E. A. COPE, Treasurer.

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STATEMENT OF UPDIKE GRAIN COMPANY, at close of business, 6-30-16.

Resources,		Liabilities	
Cash on hand,	$520,734.02	Capital Stock,	$1,000,000.00
Grain on Hand and in transit,	69,421.12	Surplus & undivided profits, - -	100,844.05
Stocks, - - -	581,030.00	Accounts Payable,	1,142.09
Board of Trade Memberships,	14,550.00	Bills payable,	315,907.99
Bills Receivable,	38,575.00		
Accts Receivable,	525.00		
Elevators, plants, real estate & coal buildings, including terminal elevator at Lincoln, Neb.	193,058.99		
	$1,417,894.13		$1,417,894.13

W. B. UPDIKE, President,

C. L. BABCOCK, Secretary,

E. A. COPE, Treasurer.

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(Exhibit A.)

Copy

Omaha, Nebr. March 26, 1918.

To the Collector of Internal Revenue,
For the District of Nebraska,
Omaha, Nebr.

Dear Sir:

The Updike Grain Company was organized under the laws of the State of Nebraska August 21, 1899 and did business up to August 27, 1917, on which date the Company was duly dissolved in pursuance of the laws of the State of Nebraska, and since said date the said corporation has not been in existence. Prior to the dissolution of said Company in pursuance of Article 85 of the Income Tax Regulations, then in full force and effect as supplemented by ruling of the Acting Commissioner of Internal Revenue under date of March 22nd, 1917, the said corporation retained from its assets and paid Federal Income Tax and excess profits tax for the fractional part of the year 1917, such payments being made in pursuance of the final and fiscal returns duly made and filed in accordance with said rulings.

Prior to the said dissolution of said corporation all of the indebtedness of the said corporation was liquidated and paid in full, and at the time of said dissolution the said corporation had no indebtedness whatsoever outstanding or unpaid and had no creditors.

At the time of said dissolution a final distribution of all of the assets of said corporation was made, and all of said assets were paid as a final dividend to stockholders, such payment being made in accordance with the law of the State of Nebraska. Since said payment the said corporation has not been in existence, nor is there in existence any money or other property of said corporation, nor are there any officers, directors or stockholders.

I am addressing this communication to you because I hold the position of Secretary of said corporation prior to its dissolution, and because I am aware of regulation known as Article 61 of the regulations in reference to the Income Tax Act of October 3rd, 1917 (but which I am advised is erroneous), and in order that a statement of the facts in this matter may be made for your records.

Yours truly,

Reg 33 (Revised)
Art. 61.

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(Exhibit B)

HOLDERS OF COMMON STOCK OF THE UPDIKE GRAIN COMPANY
August 28, 1917.

J. B. Updike	5667	Office
Martha E. Updike	4080	2614 Jackson St. Omaha.
Edward Updike	2940	Office
R. B. Updike	892	Office
Jay M. Mashler	500	373 Broadway, Milwaukee, Wis.
Hazel Updike	400	2614 Jackson St., Omaha
R. B. Updike, Jr.	400	2614 Jackson St., Omaha
Charles Howe	400	530 Postal Tele. Bldg., Chicago
Gorton Roth	400	Office
Eva Y. Roth	400	Office
O. M. Smith	364	Office
Mrs. J. L. Babcock	320	Pecatonica, Ill.
F.H. Lichton	250	373 Broadway, Milwaukee, Wis.
P.H. Updike	230	960 Arapahoe St. Los Angeles, Cal.
Ed. P. Smith	200	Office
Geo. A. Roberts	200	Omaha Grain Exchange Bldg., Omaha
C. Arthur Howe	175	530 Postal Tele. Bldg., Chicago
F. L. Babcock	162	Pecatonica, Ill.
F. O. Goodwill	160	Pecatonica, Ill.
F. B. Johnson	132	c/o Omaha Printing Co., Omaha.
M. M. Betzner	110	c/o C&NW Ry. Co., Sioux City, Iowa
Thomas Wolfe	100	David City, Nebr.
A. Pickens	100	Hastings, Nebr.
F. J. Thatcher	100	530 Postal Telegraph Bldg., Chica
Frank L. Wood	100	373 Broadway, Milwaukee, Wis.
L. W. Schreiber	84	Office.
F. A. Howard	81	Office.
L. Claude Hamilton	78	4827 Dodge St. Omaha.
Mary S. Updike	73	2612 Farnam St. Omaha.
J. B. Hill	72	Hopewell, N. J.
C. J. Smyth	50	Omaha Nat. Bk Bldg., Omaha.
Frank R. O'Neill	50	R. F. D. #2, Benson, Nebr.
Theodore M. Grow	50	Office
Henry Figard	40	Seward, Nebr.
Bertha M. Banks	40	c/o Corn Exchange Bk., 72nd St. & Columbus Ave., New York, N. Y
J. Harvey Stout	30	Hopewell, N. J.
Jo. Hamilton	28	4827 Dodge St., Omaha.
Agnes Johnson	21	2929 Frederick St., Omaha.
Georgia E. Babcock	20	117 Ruby Ave. Colorado City, Colo
B. R. Sloat	20	Harvard, Nebr.
Alex L. Hart	20	Sawyer, Nebr.
Charles Figard	20	Thedford, Nebr.
Charles Zinkey	20	Seward, Nebr.
Isabelle Thorpe	20	2146 S 35rd St. Omaha.
Mrs. Nellie Goodwill	20	Pecatonica, Ill.
Hattie B. Updike	20	960 Arapahoe St., Los Angeles, Cal
Winifred S. Updike	20	128 S 35th St., Omaha.
George Loff	20	c/o Standard Timber Co. Evanston,
J. A. Pickinson	20	P. O. Box 1287, Lincoln, Nebr.
F. C. Bell	20	Office
Mrs. A. E. Merriam	18	18 Hazlett St., cor. S. Boston Ave
E. S. Harvey	10	Bridgeport, Nebr.
Lawrence E. Updike	10	960 Arapahoe St., Los Angeles, Cal
Marjorie D. Updike	10	960 Arapahoe St., Los Angeles, Ca
H. E. Miller	10	Office
A. . Murtagh	5	5164 Cass St., Omaha.
S. A. Tobey	5	Gresham, Nebr.
Lucy Updike	4	4908 Davenport St., Omaha.
Grace M. Babcock	4	Pecatonica, Ill.
Victoria Samuels	4	336 S 13th St. Lincoln, Nebr.
Clara McCardel	4	Office
E. E. Murtagh	4	5164 Cass St., Omaha.
Edward A. Duell	2	R. F. D. #3 Wilber, Nebr.
Mary Louise Jackson	2	Lawrenceville, N. J.
	20000	

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CAUTION

Read this form and all instructions carefully and fill in supplementary statement on back of return first. Totals in supplementary statement must agree with totals on face of return.

Form 1031 (Revised January, 1918)—UNITED STATES INTERNAL REVENUE

CORPORATION INCOME TAX RETURN

(FOR ALL CORPORATIONS EXCEPT RAILROAD AND INSURANCE COMPANIES)

(11 Months)

Return of annual net income for the { calendar year 1917 / fiscal year ended June 30, 1917

(This and entries in blue spaces) RECEIVED 1917 Month | Page | Line

Audited by

Name of corporation Updike Grain Co

Principal office Omaha Neb

Kind of business carried on Grain Date of organization Aug 19 1899

1. Total amount of paid-up capital stock outstanding at the close of the year, or if there is no capital stock the capital other than interest-bearing indebtedness employed in the business at the close of the year. Unissued or treasury stock must not be included in this item, but only stock actually issued and outstanding at the close of the year for which this return is made.

(a) Paid-up "common stock"	$ 1 200 000 00
(b) Paid-up "preferred stock"	$
Total paid-up stock	$
or (c) Capital employed in business	$ 2 000 000 00

2. Total amount of bonded or other interest-bearing indebtedness outstanding at the close of the year, exclusive of indebtedness wholly secured by collateral the subject of sale or hypothecation in the ordinary business of the company and exclusive also of indebtedness incurred in the purchase of securities, the income from which is not subject to income tax.

Character of obligation.	Rate of interest.	Principal.
Bills Pay		$ 1 012 991 91
Total indebtedness		$

INCOME.

3. (a) Gross sales and other income from operations		$ 26 445 952 78
(b) Income from rentals, royalties, etc.		
(c) Income from interest (see Item 3c on back of return)		51 564 67
(d) Income from dividends (see Item 3d on back of return)		590 172 26
(e) Income from all other sources (see Item 3e on back)		106 736 19
Total gross sales and other income		27 244 395 90
Less total deductions		25 470 265 26
5. Total net income		2 774 130 64
Less: (a) Excess profits tax (Item 12) $ 439 091 32		
(b) Dividends received out of earnings of 1913, 1914, 1915 $		
Total (a plus b)		439 091 32
9. (a) Amount taxable at 2% (Item 8 less total of a plus b)		1 715 24432
(b) Amount taxable at 1% (Item 8b)		
10. Amount of total net income $ 1 774 130 64		
Less: (a) Excess profits tax (Item 12) $		
(b) Dividends received (Item 3d) $ 590 172 26		
Total (a plus b)		1 431 791 38
11. Amount taxable at 4% (Item 10 less total of a plus b)		1 772 539 27
If return is made for a full fiscal year ended in 1917, compute tax on as many twelfths of Item 11 as there are months from January 1, 1917, to the close of the fiscal year. Enter amount taxable here	6/11	425 021 43

DEDUCTIONS.

(See corresponding Items on back of return.)

4. (a) Cost of goods and other property sold	$ 24 629 795 97 1
(b) Expenses, general	244 [illegible] 90 1
5. (a) Losses sustained charged off	1 170 67 1
(b) Depreciation charged off	
(c) Depletion charged off	
6. (a) Interest paid (except as entered under (b) and (c))	90 018 87 1
(b) Interest paid on deposits (for banks only)	
(c) Interest paid on indebtedness wholly secured by collateral	
7. (a) Domestic taxes paid, not including income and excess profits taxes	6 102 33 1
(b) Foreign taxes paid	
Total deductions	$ 470 265 26

TAX

12. Amount of excess profits tax (see instructions below)	$ 439 091 32 1
13. Amount of 2% tax (2% of Item 9a)	$ 34 304 99 1
14. Amount of 1% tax (1% of Item 9b)	
15. Amount of 4% tax (4% of Item 11)	16 300 66 1
16. Total tax assessable	509 517 97

We, the undersigned, president and treasurer of the above-named company, whose return of net income is herein set forth, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in the supplementary statement and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief, true and correct in each and every particular.

Sworn to and subscribed before me this ..... day of ....., 19....

State of Nebraska, } ss.

(Official capacity.)

President.

Treasurer.

GENERAL INSTRUCTIONS.

Excess profits tax.—For the purpose of the excess profits tax, every corporation subject to income tax shall be deemed to be engaged in business, and all the income and business in which it is engaged (whether continuously carried on or not) shall be treated as a single trade or business, and all its income from whatever source derived shall be considered to be received from such trade or business.

In the case of a trade or business having no invested capital or not more than a nominal capital, the excess profits tax is equivalent to 8 per cent of the net income in excess of $5,000. This tax applies primarily to corporations engaged principally in rendering personal service in which the employment of capital is not necessary and the earnings of which are to be considered primarily to the activities of the owners.

In the case of a trade or business having more than a nominal invested capital, the excess profits tax is equal to various percentages of the net income, depending on its ratio to the invested capital. Every corporation having a net income of over $5,000 for the taxable year must make a return of invested capital and compute the amount of tax. Form 1088.

For further instructions see Regulations No. 41, Relative to the War Excess Profits Tax. A copy can be obtained from any collector of internal revenue.

Time of filing returns.—Returns made on the basis of a calendar year must be filed on or before March 1 with the collector of internal revenue of the district in which is located the principal place of business of the corporation; if made on the basis of a FISCAL YEAR, they must be filed within 60 days after the close of such year.

Fiscal year.—Corporations desiring to make returns of annual net income on the basis of a fiscal year other than the calendar year must, not less than 30 days prior to March 1 of the year in which the return would be due if made on the calendar year basis, file with the collector a notice in writing designating the last day of some month as the close of each fiscal year. A return for that portion of the calendar year ending with the date designated as the close of the fiscal year must be filed on or before the first day of March of the next calendar year, and the return for each full fiscal year thereafter must be filed within 60 days after the closing date of the fiscal year so established.

Extension of time.—In the case of neglect to file the return within the prescribed time, the collector is authorized to grant an extension of the filing period not exceeding 30 days from the normal due date, provided such neglect was due to absence or sickness and provided an application for such extension is made in writing prior to the expiration of the period for which extension may be granted. In meritorious cases the Commissioner is authorized to grant such further extension as he may deem proper.

Signatures and verification.—Returns must be signed and verified by two officers of the corporation, that is, by the president, vice president, or other principal officer, and the treasurer or other financial officer, and must be sworn to before an officer authorized to administer oaths, and the seal of the attesting officer, if he is required to have a seal, must be impressed on the return in the space provided for that purpose.

Subsidiary companies.—The corporation making this return must attach hereto a list of all its subsidiary companies, if any, with the location of the principal place of business of each. Each subsidiary company must make a separate and distinct return.

Foreign corporations.—Foreign corporations subject to the law are required to make returns to the collector of the district in which is located the principal place of business or agency through which is transacted the business in the United States, or if the corporation has no place of business or agency in the United States, the return will be filed with the collector of internal revenue at Baltimore, Maryland. The gross income to be returned is that received from business transacted and capital invested in the United States, including interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, and including income derived from dividends on capital stock or from net earnings of indirect corporations, joint-stock companies, or associations whose net income is taxable under this law. The deductions allowable are those losses and disbursements incidental to or necessary in the transaction of the business in this country, all as specifically set out in the Act. Foreign taxes are not deductible from the gross income arising and accruing to a foreign corporation from business done or capital invested in the United States. If a foreign corporation has no place of business or agency in the United States and no return is made, the tax on income from interest and dividends will be withheld at the source.

Penalties.—Corporations refusing or neglecting to file returns within the time prescribed by law or rendering false or fraudulent returns shall be liable to a penalty of not exceeding $10,000, and an additional tax of 50 per cent in case of neglect to file the return within the time prescribed by law, and 100 per cent in the case of a false or fraudulent return, shall be added to the assessment; provided, in case of delinquency, if the return is voluntarily filed without notice from the collector, and it is shown that delay in filing was due to reasonable cause and not to willful neglect, the 50 per cent additional tax will not be assessed. A statement of the cause of delay must be attached to each delayed return.

Any officer or any corporation required by law to make, render, sign, or verify any return who makes any false or fraudulent return or statement with intent to defeat or evade the assessment required to be made shall be guilty of a misdemeanor, and shall be fined not exceeding $2,000 or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

SUPPLEMENTARY STATEMENT

The following information must be furnished, either on this sheet or on attached schedules, by every corporation, joint-stock company, or association. Without such information the return will not be accepted as complete. The items below relate to the correspondingly numbered items on the first page.

2. (a) FROM INTEREST.

Interest to be reported as income for the purpose of the income tax includes all interest received on bonds or securities owned by the corporation except interest on obligations of a State or political subdivision thereof or interest upon the obligations of the United States or its possessions.

2. (d) FROM DIVIDENDS RECEIVED.

Any distribution made or ordered to be made by a corporation out of its earnings or profits accrued since March 1, 1913, whether in cash or stock of the paying company, must be returned (under Item 2 (d) on front page of this form) by the receiving corporation as income of the year in which the distribution was made or ordered to be made and will be taxed at the rates prescribed by law for the years in which surplus or profits distributed were earned, viz, 1% on amounts received out of earnings of 1913 (subsequent to March 1, 1913), 1914, and 1915, and 2% on amounts received from earnings of 1916 and 1917. A statement from the corporation paying the dividends included herein should be attached to this return, showing separately the amount of dividends paid out of earnings of each year; otherwise, they will be deemed to have been paid out of the earnings of 1917 and will be taxed 2%. The receiving corporation, in order that tax may be computed on dividends received in 1917 at the rates applicable to the years in which the profits were earned, must fill in the following form:

Dividends received in 1917 out of profits earned each year subsequent to March 1, 1913.

1913	1914	1915	1916	1917	Total.
$	$	$	$	$	$

2. (e) FROM OTHER SOURCES.

Income received from all sources not elsewhere specified should be itemized below:

				$	
Total				$	

4. (a) COST OF GOODS AND OTHER PROPERTY SOLD.

Report the cost of goods sold in the following form:

Merchandise bought for sale		$	
Cost of manufacturing or otherwise producing goods (if separately shown on books). (Submit schedule showing principal items of cost.)			
Plus inventories at beginning of year			
Total		$	
Less inventories at end of year			
Net cost of goods sold		$	

Explanations

If the corporation makes inventories of merchandise or materials, explain the basis on which they are made, whether (a) at cost, or (b) at cost or market value, whichever is lower. If no inventories are made, make no entries referring to inventories, but report the total cost of goods purchased or produced during the year. If the cost of manufacturing or otherwise producing goods is not kept separate from general expenses in the corporation's accounts, the ordinary cost items (labor, material, general) should be reported below.

Corporations dealing in real estate, and any corporation that has sold any of its capital assets during the taxable year, should report the cost of the property sold in the following form:

1. Original cost of property		$	
2. Market value March 1, 1913, if acquired before that date			
3. Cost of subsequent improvements, if any			
4. Depreciation and depletion to date of sale			
5. Net cost (item 1 or item 2 plus item 3 minus item 4)			

State how market value March 1, 1913, was determined

Does such value include any good will? If so, how much? $

4. (b) EXPENSES, GENERAL.

This item should include only the ordinary and necessary expenses paid within the year in the operation of the business and maintenance of the properties of the corporation, itemized as per schedule below. **It must not include any expenditures reported under 4 (a), 5, 6, or 7.**

Expenditures for incidental repairs which do not add to the value or appreciably prolong the life of property are deductible as expenses, but expenditures for new buildings, permanent improvements or betterments which increase the value of property, or for restoring or replacing property, are not deductible under this or any other item of the return. Such expenditures are properly chargeable to capital account, to be extinguished through annual depreciation allowances.

Payments made to officers or employees, who are stockholders, in the guise of salaries or compensation, the amount of which is based upon the stockholdings of such officers or employees, are not deductible as a business expense.

1. Salaries of officers		$			
Salary, wages, commissions, etc. (not included in "Cost of merchandise bought for sale, or otherwise producing goods" under 4 (a))					
2. Rents, royalties, and other payments in lieu of rent					
3. Repairs, ordinary and incidental					
4. Other expenditures (classify)					
Total expenses		$			

If salaries were increased or extra compensation was paid to officers, state the amount, the reason therefor, and the basis on which computed

5. (a) LOSSES.

Losses deductible under this item must be distinguished from depreciation or allowances for exhaustion, wear, and tear. The losses, not compensated by insurance or otherwise, must be absolute, complete, actually sustained during the year, and charged off on the books of the corporation.

Kind of property on which loss is claimed.	Cost of property.	Cause of loss.	Amount charged off within year.
	$		$
Total			$

When were the deducted losses ascertained to be such?

How were they so ascertained?

The cost of property lost should be determined as indicated in Item 4 (a).

A bad debt admitting losses accrued since January 1, 1909, will not be allowed as a deduction unless the amount was reported as income for the year in which the debt was created.

State how the debts charged off (if any) were ascertained to be worthless

If at any future time a debt charged off as worthless is collected the amount collected must be returned as income for the year in which received.

Unpaid debts are not deductible if made good by recovery of property sold or securities of property pledged.

5. (b) DEPRECIATION.

The amount deductible on account of depreciation is an amount charged off which fairly measures the loss during the year in the value of physical property by reason of ordinary use, wear, and tear. Such amount should be determined upon the basis of the cost of the property and the probable number of years constituting its life. Stocks, bonds, and like securities, as well as any other intangible assets, are not subject to exhaustion, wear, and tear within the meaning of the law. Hence any amount charged off as representing a shrinkage in the value of such assets is not deductible either as depreciation or as a loss.

Depreciation computed on total foregone value of merchandise in stock is not an allowable deduction by reason of damage or deterioration the ascertainment is unreliable.

If a deduction is made on account of depreciation, the following statement must be filled in:

Kind of property.	Its cost.	Probable life after replacement.	Amount of depreciation charged off. This year.	Previous years.
	$		$	$
Totals	$		$	$

If building, state under "Kind of property" the material of which constructed.

5. (c) DEPLETION.

Depletion applies to the extraction of natural deposits, and contemplates a deduction in return for the depreciation the capital invested, or in case of purchase prior to March 1, 1913, an amount sufficient to return to the corporation the fair market price or value of such deposits as of that date. An allowable deduction on account of depletion must not exceed the fair market value as of March 1, 1913, or the cost subsequent to that date, of the product mined and sold during the year, and will be determined in accordance with the rule set out in Articles 179 to 173, Regulations 33, Revised. The amount sought to be deducted on this account must be charged off on the books of the company.

*Kind of property.	Its cost Recorded (according to March 1, 1913.	†Fair market value as of March 1, 1913.	Amount of depletion charged off. This year.	Previous years.
	$	$	$	$

* Cost, from ore mined, etc., of ore.
† Where fair fair market value as of March 1, 1913, was determined

6. INTEREST PAID.

(a) The amount of interest deductible under (c) is the amount actually paid within the year on an amount of bonded or other indebtedness (except as to indebtedness falling under 6 (b) or 6 (c) and indebtedness incurred for the purpose of obligations or securities the income from which is exempt from income tax) not in excess of the sum of the paid-up capital stock outstanding at the close of the year or if there is no capital stock, an amount of capital (not including interest-bearing indebtedness) employed in the business at the close of the year, plus, in each case, one-half of the interest-bearing indebtedness also then outstanding.

Capital employed in the business, as here used, comprehends the entire capital paid in by the members of the company, including so much of the accumulated surplus as is actually employed in the business, but does not include any borrowed capital or interest-bearing indebtedness.

(b) Interest paid (by banks) on deposits or on money received for investment and secured by interest-bearing certificates of indebtedness issued by a bank, banking association, or loan or trust company is deductible in the entire amount so paid.

(c) If the corporation's indebtedness, or any part thereof, is wholly secured by collateral which is the subject of sale or hypothecation in the corporation's ordinary business as a dealer in such property, the interest paid on an amount of such indebtedness not exceeding the actual value of the collateral may be deducted.

Describe all obligations on which interest is paid in the following form. Distinguish plainly collateral loans falling under 6 (c) and also obligations issued for the purchase of securities, the income from which is exempt from income tax.

Kind of obligation.	Amount of principal.	Rate of interest.	Amount of interest paid.
	$		$
Total	$		$

7. (a) TAXES PAID.

Taxes, paid or accrued on the books of the corporation during the taxable year, are deductible with the following exceptions: Federal income and excess profits taxes (including taxes paid on the interest on its own obligations in pursuance of a contract entered into relieving the holder of liability for such taxes), foreign taxes on income derived from sources within the United States by foreign corporations, local taxes specially assessed against property on account of benefits derived from public improvements or betterments, and taxes upon the corporation's capital stock in the hands of the stockholders.

BASIS OF RETURN.

Is this return made on the basis of actual receipts and disbursements?

If not, describe fully what other basis or method was used in computing net income

UNDISTRIBUTED INCOME, SURPLUS, AND UNDIVIDED PROFITS.

Total net income of taxable year preceding that for which this return is made (less income tax paid thereon)		$
Amount of such income remaining undistributed six months after the close of that year		
Amount of such income remaining undistributed twelve months after the close of that year		
Total surplus and undivided profits at close of taxable year		

If sufficient space is not provided for the entry of any information required in the "Supplementary Statement," schedules in the form indicated, marked with the number of the item to be explained, should be attached to this form.

REVISED AUDITED

FORM 1120—UNITED STATES INTERNAL REVENUE.

CORPORATION EXCESS PROFITS TAX RETURN

11 mos Ending June 30. 1917

Taxable year ended _____, 19__

(Do not write in this space.)
RECEIVED

LIST.
Month. | Page. | Line.

Audited by

CAUTION

Read all instructions.

Answer all questions.

If necessary, ask your Collector of Internal Revenue for assistance.

Name Updike Grain Co.

Business address 623 Grain Exchange Bldg Minneapolis

Kind of business Grain

Date established Aug. 1899

GENERAL INSTRUCTIONS.

1. Complete instructions.—For complete instructions concerning the filing of this form see Regulations No. 41 relative to the War Excess Profits Taxes imposed by the War Revenue Act approved October 3, 1917, referred to hereinafter as Excess Profits Tax Regulations. Copies can be obtained from any collector of internal revenue.

2. Who must make a return on Form 1103.—Every corporation having for the taxable year a net income of $3,000 or more (see Form 1031) must make a return on this form of its average invested capital during the taxable year and compute the amount of its excess profits tax, if any, as directed herein.

This return should be made at the same time and in the same manner as the return of net income for the taxable year on Form 1031.

A corporation which claims that it employs in its business only a nominal capital or that it can not satisfactorily determine the amount of its invested capital must, nevertheless, fill this form as far as practicable in order to show the facts necessary for action on its claim.

3. Taxable year.—The taxable year is the calendar year 1917 or (if the fiscal year of the corporation differs from the calendar year) the fiscal year ending in the calendar year 1917. A corporation whose fiscal year differs from the calendar year may also use this form for its return (without entries for prewar period) covering the fiscal year ending in 1918.

4. Taxable income.—All the income of a corporation from whatever source derived is deemed to be derived from its business and all such income subject to the income tax is also subject to the excess profits tax except as provided for in Schedule I.

5. Deduction.—Each corporation whose income (derived from a business carried on with invested capital) is subject to excess profits tax may deduct from the amount of its taxable income (1) an amount equal to not less than 7 per cent and not more than 9 per cent of the amount of its invested capital, as explained below, and (2) $3,000.

If the corporation was not in existence during the whole of at least one of the calendar years 1911, 1912, and 1913, designated by the act of October 3, 1917, as the prewar period, and has not succeeded to the control of a business which was carried on during any one or more of those years, the first deduction is an amount equal to 8 per cent of the amount of invested capital. Otherwise the deduction is an amount equal to the same percentage of the invested capital for the taxable year as the average net income during the prewar period was of the average invested capital during that period, provided that if such percentage is less than 7 per cent, the deduction shall be computed at the rate of 7 per cent and if more than 9, at the rate of 9 per cent (see Excess Profits Tax Regulations, Article 21).

In order to take advantage of this provision, the corporation must make a return of invested capital during the prewar period as well as during the taxable year. Space for such a return is provided on this form.

If the corporation prefers, it may compute the deduction at the rate of 7 per cent and avoid the necessity of rendering a return of invested capital for the prewar period. In any case the average amount of invested capital during the taxable year must be determined if possible.

6. Invested capital.—For definition of "invested capital" and complete instructions for computing its amount see Excess Profits Tax Regulations, Articles 42 to 69.

7. Computation of tax for fiscal year, part of which falls in the calendar year 1917.—The tax of a corporation whose fiscal year differs from the calendar year shall be that proportion of the tax computed on the net income for the fiscal year which the number of months from January 1, 1917, to the end of the fiscal year bears to the entire number of months in the fiscal year.

8. Corporations making claim for assessment under Article 58 of the Regulations (section 210 of the act of October 3, 1917) should answer all questions and fill all schedules so far as possible and attach a statement explaining why it is impracticable or in the case of foreign corporations, unreasonably expensive to fill out the entire return.

SCHEDULE I.—NET INCOME FOR TAXABLE YEAR SUBJECT TO EXCESS PROFITS TAX.

1. Net income for taxable year shown in Item 8, Form 1031		$ 2 174 330 67
2. Plus interest on obligations of the United States issued since September 24, 1917, held by corporation in excess of $5,000 par value		none
3. TOTAL		$ 2 174 330 67
4. Less interest on Item 24, Form 1031	$ 590 142 26	
5. (b) Interest paid (not in excess of legal limit) on indebtedness incurred for purchase of obligations reported in item 2, above		
6. NET INCOME SUBJECT TO EXCESS PROFITS TAX		$ 1 584 188 41

SCHEDULE II.—INVESTED CAPITAL.

ITEM.	1911	1912	1913	TAXABLE YEAR.
1. Capital, surplus, and undivided profits at the close of the preceding year as shown by corporation's books before making any adjustments therein (from Schedule A)	$ 1 101 771 11	$ 1 075 724 06	$ 1 131 334 19	$ 1 298 510 46
2. Adjustments by way of additions (from Schedule B)				
3. TOTAL	$ 1 101 771 11	$ 1 075 724 06	$ 1 131 334 19	$ 1 298 510 46
4. Adjustments by way of deductions (from Schedule C)		68 400 00		279 884 12
5. Invested capital at beginning of year (Item 3 less Item 4)	$ 1 101 771 11	$ 1 007 324 06	$ 1 131 334 19	$ 1 018 626 34
6. Changes in invested capital during year (from Schedules D and E)				
7. Invested capital for year	$ 1 101 771 11	$ 1 007 324 06	$ 1 131 334 19	$ 1 018 626 34
8. TOTAL INVESTED CAPITAL FOR PREWAR PERIOD				$ 3 140 733 36

SCHEDULE III.—DEDUCTION. 7% Invested Capital (Art)

$ 983,740.81

1. Percentage—net income to invested capital for prewar period. (Item 6, Schedule F, divided by Item 8, Schedule II. Carry out result as far as desired, but drop the remainder, if any, without increasing the last figure of the percentage		24 %
2. Percentage to be used in computing deduction (see Instruction 5)		7 %
3. Amount of deduction computed at above rate on invested capital for taxable year 7% of $983,740.81		$ 15 341 86
4. Exemption (except for foreign corporations) 1/11 of 3000.00		2 727 00
TOTAL DEDUCTION		$ 18 068 86

SCHEDULE IV.—COMPUTATION OF TAX.

CLASSES OF INCOME FOR COMPUTATION OF TAX. Over—	But not over—	Amount of income in each class	Deduction (if in excess of 15 per cent of invested capital, enter only 15 per cent on first line and balance on line or lines below).	Balance subject to tax.	Rate.	AMOUNT OF TAX.
$0.00	15 % of invested capital	$ 140 061 12	$ 68 111 86	$ 71 949 26	20%	$ 14 389 85
15 % of invested capital	20 % of invested capital	46 687 04		46 687 04	25%	11 671 76
20 % of invested capital	25 % of invested capital	46 687 04		46 687 04	33⅓%	15 562 34
25 % of invested capital	33⅓ % of invested capital	74 699 26		74 699 26	41⅔%	31 124 67
33⅓ % of invested capital		1 276 053 92		1 276 053 92	60%	765 632 35
TOTAL		$ 1 534 188 38	$ 68 111 86	$ 1 516 076 52		$ 841 649 07

6/11 of Total $ 459,081.32

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SCHEDULE A.—CAPITAL, SURPLUS, AND UNDIVIDED PROFITS AS SHOWN BY BOOKS BEFORE MAKING ANY ADJUSTMENTS THEREIN.

A1. Stock actually outstanding (not in the corporation treasury) at the end of the preceding taxable year may be counted as invested capital to the extent that it is paid up.

A2. Reserves consisting of amounts not deductible in the computation of net income under the income tax law, may, if properly explained, be included as part of the surplus for the purpose of computing the invested capital.

ITEM	1911	1912	1913	TAXABLE YEAR
Capital stock paid up and actually outstanding at the close of the preceding year (not including treasury stock):				
1. First preferred	$ 41900 00	$ 41900 00	$ 41900 00	$
2. Second preferred				
3. Common	1000000 00	1000000 00	1000000 00	1000000 00
4. Total	1041900 00	1041900 00	1041900 00	1000000 00
Surplus and undivided profits:				
5. Paid-in surplus				
6. Earned surplus	59871 11	33824 06	89433 89	298510 46
7. Undivided profits				
8. GRAND TOTAL OF ITEMS 4, 5, 6, AND 7	$ 1101771 11	$ 1075724 06	$ 1131333 89	$ 1298510 46

SCHEDULE B.—ADJUSTMENTS BY WAY OF ADDITIONS.

B1. If any part of the interest on the corporation's permanent indebtedness was excluded as a deduction from the corporation's income for any year (see Form 1031), a proportionate part of such indebtedness may be added to invested capital for that year as Item 1, Schedule B.

B2. If any addition to invested capital is reported in Item 2, Schedule B, submit a full statement showing the kind of property, the date when paid in, its value on that date, and how the value was determined.

B3. If an addition to invested capital is reported in Item 3, Schedule B, submit a statement showing the kind of property, its cost, and the year in which it was acquired.

B4. If any addition to invested capital is reported in Item 4, Schedule B, state specifically the amount of depreciation or depletion written off each year in the books of the company and the amount allowed as a deduction in computing taxable income.

ITEM.	1911	1912	1913	TAXABLE YEAR
1. Proportion of permanent indebtedness, the interest on which is not deductible from income in computing income tax (Article 44)	$	$	$	$
2. Value of tangible property in excess of par value of stock issued therefor (Article 61)				
3. Additions to capital account allowable under Article 54	None			
4. Depreciation charged in accounts of corporation but disallowed by Treasury Department as expense on income tax returns				
5.				
6.				
7. Total	$	$	$	$

SCHEDULE C.—ADJUSTMENTS BY WAY OF DEDUCTIONS.

C1. Is any good will, trade-mark, trade brand, franchise, or similar intangible property, [illegible] entered on the books of the corporation at a value in excess of its [illegible] per [illegible]? No In excess of the [illegible] value of the stock issued therefor?

[illegible] cent (in the aggregate) of 20 per cent of the par value of the stock outstanding on March 3, 1913? No

If so, submit a statement showing (a) date of acquisition, (b) cash value at that date, (c) par value of stock issued therefor, (d) par value of total stock outstanding on March 3, 1913, and (e) value at which the assets are entered on the books of the corporation.

The amount by which "c" exceeds "b," "d," or 20 per cent of "d," whichever is lowest, must be entered as Item 1, Schedule C, for the taxable year and for each year of the prewar period that is affected.

C2. Is any patent or copyright paid in for stock entered on the books of the corporation at a value in excess of its actual cash value when paid in? No In excess of the par value of the stock issued therefor?

If so, submit a statement showing (a) date of acquisition, (b) cash value of the patent or copyright at that date, (c) par value of the stock issued therefor, and (d) value at which the patent or copyright is entered on the books of the corporation.

The amount by which "d" exceeds "b" or "c," whichever is the lower, must be entered as Item 2, Schedule C, for the taxable year and for each year of the prewar period that is affected.

C3. Is any stock entered on the books of the corporation at a value in excess of its actual cash value when received? No In excess of the par value of the stock issued therefor?

Is any tangible property paid for specifically with stock before January 1, 1914, entered on the books of the corporation at a value in excess of its actual cash value on that date? No

If the answer to any of the foregoing questions is "Yes," submit a statement showing (a) kind of property, (b) when acquired, (c) par value of the stock paid therefor, (d) actual cash value of the property when paid in, (e) actual cash value of the property on January 1, 1914, if paid in before that date, (f) basis of the valuation stated under "e" (g) value at which the property is entered on the corporation's books, and (h) amount by which such value exceeds the allowable value under Article 54 of the Excess Profits Tax Regulations. Enter this amount as Item 3, Schedule C, for the taxable year and for each year of the prewar period that is affected. (Note that the value January 1, 1914, does not affect the prewar period.)

C4. (a) Was any stock issued by the corporation ever received as a gift or for a consideration substantially less than its par value? No (b) If so, what was the par value of such stock?

(c) What amount of cash or its equivalent was derived from the sale of such stock? $

The amount of "b" over "c" must be entered as Item 4, Schedule C, for the taxable year and for each year of the prewar period that is affected.

C5. Was the business [illegible] or consolidated, or was its ownership changed since [illegible]? No

(a) Did an interest in the business of 50 per cent or more remain in the control of the same persons, corporations, associations, or partnerships, or of any of them?

(b) Were any of the assets entered on the books of the corporation making this return at a higher value than on the books of its predecessor? No

(c) If so, were such assets paid for specifically as such in cash or tangible property?

The increase in book value of any property not so paid for must be deducted from the invested capital for the taxable year as Item 5, Schedule C, unless it can be shown that under the excess profits law and regulations the property was undervalued on the books of the predecessor business.

C6. Is any property paid for with cash or with other tangible property entered on the books of the corporation at a value in excess of the amount of cash paid therefor or the actual cash value of the tangible property paid therefor? No If so, submit a statement showing (a) kind of property, (b) amount of cash paid therefor, (c) actual cash value of other tangible property paid therefor, (d) how that value was determined, (e) value at which the property is entered on the books of the corporation, and (f) excess of "e" over "b" or "c." This excess must be entered as Item 6, Schedule C, for the taxable year and for each year of the prewar period that is affected.

C7. Has adequate provision been made in the expense accounts of the company for (a) losses of [illegible] assets, (b) depreciation? Yes; (c) obsolescence? Yes

(d) depletion of mineral deposits, timber supplies, and the like?

If adequate charge has not been made for depreciation, depletion, obsolescence, and other items, and the value of the property has not been maintained by replacements that have been charged to expense, proper additional charges for depreciation must be computed for all years in which they were not made on the books, and the total amount of such charges must be entered as Item 7, Schedule C, for the taxable year (and for each year of the prewar period that was affected) and deducted in arriving at its surplus and undivided profits.

C8. Has the corporation any stocks, bonds (other than obligations of the United States), or other assets, the income from which is not subject to excess profits tax? Yes

If so, at what value are they carried on the corporation's books? $

Has any portion of such assets been included in invested capital in accordance with Articles 45 and 46 of the Excess Profits Tax Regulations? No If so, how much? $

Is the balance in excess of the corporation's indebtedness, excluding the amount thereof that has been included in invested capital as Item 1, Schedule B? No If so, state the amount of such excess $

Enter this amount as Item 8, Schedule C, for the taxable year, and make a similar correction for each year of the prewar period.

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SCHEDULE C.—ADJUSTMENTS BY WAY OF DEDUCTIONS (Continued).

ADJUSTMENT OR AMOUNT TO BE (See corresponding instructions on page 11)	1914	1915	1916	TAXABLE YEAR
1. Valuation of good will, trade-marks, trade brands, franchises, or other intangible property purchased with stock (Articles 57 and 58)	$	$	$	$
2. Valuation of patents and copyrights paid in for stock (Article 59)				
3. Valuation of tangible property paid in for stock (Article 56)				
4. Stock returned to corporation as a gift, etc. (Article 54)				
5. Valuation of assets acquired in reorganizations (Article 60)				
6. Appreciation (Article 47)				
7. Depreciation and depletion (Article 43)	22442	6840000	224-2	279884 12
8. Excess of stocks and other inadmissible assets over indebtedness (Article 44)				
9.				
10.				
11. TOTAL DEDUCTIONS	$	$ 6840000	$	$ 279884 12

SCHEDULE D.—CHANGES IN INVESTED CAPITAL DURING TAXABLE YEAR.

Specify (by using red ink for distributions, or otherwise) whether each item represents an addition or a distribution.

Report dividends paid out of profits of prior years but not dividends paid out of profits of the taxable year.

In column 4 enter the number of whole months remaining in the year, plus a fraction consisting of the number of days remaining in the month (including the date of change) divided by the total number of days in the month.

Assets (other than cash) paid in for stock, must be valued in accordance with Articles 56 to 60 of the Excess Profits Tax Regulations.

Nature of additions and distributions	Date	Amount	Number of months (and fraction) effective	Adjusted amount (Column 3 × column 4)
1.		$		$
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9. NET ADDITION OR REDUCTION		$		$

None

SCHEDULE E.—CHANGES IN INVESTED CAPITAL DURING PREWAR PERIOD.

(Show all changes in capital or surplus separately for each year.)

Nature of additions and distributions	Date	Amount	Number of months (and fraction) effective	Adjusted amount (Column 3 × column 4)
1.		$		$
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				
10.				
11.				
12.				
13.				
14.				
15.				
16.				
17.				
18.				

None

SCHEDULE F.—NET INCOME DURING PREWAR PERIOD.

ITEM.	1913	1914	1915
1. Net income for year as reported on income tax return. (Do not include figures for less than a whole year's income)	$ 58304 92	$ 4534 72	$ 48426 40
2. Plus amount of Federal income tax paid during year	53 80	533 05	-0-
3. Totals for each year	58357 72	5067 77	48426 40
4. Less amount of dividends received in 1913			12477 23
5. NET TOTAL for year 1913			-0-
6. GRAND TOTAL FOR PREWAR PERIOD			63726 19

QUESTIONS

1. Explain the nature of the corporation's business if not adequately described on line one:
   (a) Main business: Buying & selling grain, owns a no. of grain elevators in Nebraska and Iowa
   (b) Collateral business, if any:

2. Date of incorporation: Aug 19, 1889 3. Under the laws of what State or country? Nebraska

4. Enter on the following lines the names and addresses of three representative concerns in your locality engaged in the same kind of business:
   Iowa Farmers Elevator Co Omaha Neb
   Omaha Elevator Co " "
   Nebraska & Iowa Grain Co " "

5. What was the fair value of the total capital stock of the corporation as determined in the last assessment of the capital stock tax (if any)? Specify the year: Par value

6. If any patent is included among your assets, attach a schedule to this return showing for each patent its serial number, date of issue, name of patentee, amount of cash or stock paid therefor, and its present book value:

7. If the corporation ever took over a going business or otherwise acquired a mixed aggregate of tangible property, patents, and copyrights, and good will and other similar intangible property, and paid for such property in whole or in part with stock or other securities, submit a statement showing—
   (a) The name of the concern taken over (or from which the property was acquired).
   (b) The nature of the assets and liabilities so acquired.
   (c) The total par value of the stock issued therefor.
   (d) The value at which each class of assets was carried on the books of the concern from which acquired. (If obtainable submit a balance sheet of the predecessor corporation as at the date of acquisition.)
   (e) The value at which each item was entered on the books of the corporation making this return. The different classes of property must be valued as prescribed by Article 59 of the Excess Profits Tax Regulations and the values so obtained must be used in making all statements in items 1, 2, and 3, Schedule C.
   If patents or copyrights were acquired, state the basis on which their value was determined, and how they were paid for.
   If good will or other intangible assets were acquired, state the basis on which their value was determined, and how they were paid for.

8. Is the corporation affiliated with one or more other corporations within the meaning of Article 77 of the Excess Profits Tax Regulations? No
   If so, submit a statement describing all its intercorporate relationships.

9. Is this return a consolidated return within the meaning of Article 77 of the Excess Profits Tax Regulations? No If so, submit a schedule showing in detail the computation of the consolidated invested capital and income.

10. If the corporation was not in existence during the whole of any one of the calendar years 1911–1913, is its business substantially a continuation of a business carried on during any one or more of those years? If so, give name under which, and address at which, its business was then carried on:

11. Submit a copy, in detail, of—
   (a) The balance sheet of the corporation at the beginning of the taxable year.
   (b) The balance sheet of the corporation at the close of the taxable year.

We, the undersigned, president and treasurer of the above-named company, being severally duly sworn, each for himself deposes and says that the foregoing return, including the accompanying schedules and statements (if any), has been examined by him and is to the best of his knowledge and belief a true and complete return made in good faith pursuant to the Excess Profits Tax Regulations.

Sworn to and subscribed before me this ..... day of ....., 19....

(Seal of officer taking affidavit.)

President.

Treasurer.

153 Cross-Examination

By Mr. Ellick:

Those are the returns witness referred to in his report when he said: "Amended returns and claims for refunds covering adjustments shown in this report for the years 1913 to 1917, inclusive, could not be secured as it was stated by the former Secretary of the company that there were no officers of the company to execute same. Unsigned amended returns for the fiscal 11 months ending June 30, 1917, are enclosed herewith".

Question: "You therefore considered them amended returns of the returns that had been filed by the Updike Grain Company in July, August and September, 1917?"

Answer: "No, I don't think I considered them amended returns. It was really amended computations, is what I considered them at the time I made them out."

Witness referred to them as amended returns—as amendments of something. "We had an order from the Commissioner at Washington to include the year 1917 in the investigations at that time". It was in writing. Witness don't know in whose file it would be. "It came to us in the form of a field order, I believe, from the Agent in Charge." Witness has no copy of the field order that was given to him and does not know where it is.

I think the order from the Commissioner at Washington will appear in the file of the Revenue Agent in Charge at Omaha, I suppose the Revenue Agent in Charge kept a copy of the field order given to me, that is the practice of his office.

The words "Copy of return, fiscal year ending June 30, 1917" at the top of page 4 of exhibit 2, being the report made by witness October 25, 1918, refer to "a retained copy that I found in the company's office". "It was in their files purporting to be a copy of the return. I suppose it was."

154 Witness accepted it as such. Underneath the recital referred to witness set forth different items that appeared in that return. Then underneath those items, underneath the heading "Amended return fiscal year ending June 30, 1917" witness used the same item numbers as appeared in the copy of the return for that fiscal period but changed some of the figures. But witness used no different item numbers than appeared under the heading "copy of return". So that witness determined the net income for the fiscal period upon the same character of data in his amended return, that had been used by the company in their return. And in their re-

turn they had made no claim for dividends under what witness calls 3-D. But for the purpose of computing the four percent tax witness gave them credit for those dividends in his amended return. Witness also gave them credit for excess profits tax which they had not claimed in the amount of $459,081.32. That would be shown on their excess profits tax return, this form 1103, also on form 1031 revised. Witness also saw copy of their return on form 1095, which they filed in August and September, being excess profits tax return for the March 3, 1917 Act. This was simply data that witness used in the computation of the tax. It had nothing to do with showing how much the gross or net income was.

Question: "Now in that report dated October 25, 1918, addressed to John J. Gillin, revenue agent in charge, you determined the tax liability under the October 3, 1917 Act to be $365,564.61?"

Answer: "No, in my report I determined it,—(interrupted)

Question: "In your later report you made a correction of it?

Answer: "Well my original return $373,911.54 and the computation was changed by the auditor in his office."

155 Question: "In Mr. Gillin's office?"

Answer: "Yes sir."

He computed the tax differently was all. He deducted the dividends received as shown in item 3-D from the net income for the fiscal period and took six-elevenths of that amount and deducted the whole excess-profits tax from that amount in determining the amount taxable at four percent. Witness deducted the excess-profits tax and the dividends from the net income and took six-elevenths of the remainder as taxable at four percent. So far as witness knows his own method was correct. Witness is not acquainted with the rule announced in Strong Huett case and does not know that under the ruling in that case the auditor's figure showing the total taxes due to be $365,564.61 is correct, instead of witness' calculation making it 373 thousands and some dollars.

Mr. Blaisdell thereupon made the following statement:

"I understand that 373 thousand is right. I would say, as far as that is concerned, that we won't hold out on that if you can show that the other computation is approved by the Department."

Witness made a supplemental report June 30, 1919. In the return filed by the company it showed a net income of $2,371,997.05; in the amended return prepared by witness he found the net income to be only $2,174,330.64. The company "had returned net income on a different basis from what my return was founded on. They had twelve months in there in the original return while I only have eleven in my return."

From the data that was contained in the two returns filed by the company I could not have computed the correct tax under the October 3, 1917 Act. Witness could not have computed the tax under the Act of October 3, 1917, because he would not have had sufficient information to do it. He
156 could have estimated a tax probably. It is not true that the only information witness did not have would be with reference to the deductions that the taxpayer might claim. There would be additional information required on excess profits tax form 1103 that witness would not have from the return that they filed. Form 1095 showed paid in capital and surplus at the end of the year only.

Asked: "And the law provided that if they did not claim any deduction because of some pre-war income, that the department had to figure it on the basis of seven percent minimum," witness answered "They could accept the minimum, yes sir." Witness was next asked: "So that you could have figured it on the basis that they made no claim for a deduction," to which witness answered: "No, there were other items required in form 1103 that were not asked for in 1095". They did not all relate to deductions. There were additions and reductions from invested capital on account of good will and intangibles.

Witness was asked: "Well suppose they had filled in form 1103 with the same information which was contained in 1095 could you have figured the tax then?" Witness answered: "By assuming that the information that they had given there was correct I could have." That is what witness did assume in the returns which he made up.

Redirect Examination

By Mr. Blaisdell:

When witness spoke of seeing some retained copies of some returns which Updike Grain Company had in their office; there were no retained copies of returns 1103 or form 1031 required to be filed under the Revenue Act of October 3, 1917.

157 Explaining his testimony that the net income of the corporation as finally determined by him for the eleven months period in question, was some Two hundred thousand dollars less than the amount shown by the company or its returns filed under the 1916 Act, witness said: "Well the company was keeping its books on the basis of June 30 to June 30 closing date, and the fiscal year that had been designated to the Collector was July 31 to July 31 of each year. Some time between July 1st, 1916 and July 1, 1917, the company redesignated its fiscal year as June 30th ending June 30th."

So that the final income as witness determined it was adjusted to the eleven month period to make it correspond to their fiscal year. "The fiscal year they designated to the Collector . "Witness was asked: "The invested capital which you finally determined on form 1103 made up and used by you in the determination of the excess profits tax, was that or was that not materially different from invested capital as shown by the corporation on form 1095?" To which witness answered: "Yes sir, it was. About half only. Half as much". Witness was next asked: "In determining the invested capital as you did determine it, where did you get that information, from the books or from form 1095 retained copy which you found in the office?" To which witness answered: "From the books."

Recross Examination

By Mr. Ellick:

Witness said in his report to John J. Gillin, on page one, that from all the books and records available it appeared that the full amount of gross income for each year was reported and no improper deductions taken. Witness excused.

158 Mr. Blaisdell: Now I don't know, Mr. Ellick. We might save some little proof. I presume counsel are willing to concede that this assessment of $373,911.54 has never been paid?

Mr. Ellick: Yes sir.

Mr. Blaisdell: You are willing to concede that that is absolutely unpaid?

Mr. Ellick: Well wholly unpaid except as might be the result of this re-computation of the individual incomes of the parties.

Mr. Blaisdell: Well we could call the Collector there. Officers in the Collector's office.

The Court: It is wholly unpaid by Updike Company.

Mr. Ellick: Yes.

Mr. Blaisdell: I simply want to show that neither the Updike Grain Company nor these defendants have paid any of this amount. Excepting as to some credits they might be entitled to on their individual returns.

Mr. Ellick: Excepting as to over-payment in their individual returns.

Mr. Kinsler: Yes, that is the matter to be determined later on.

Mr. Ellick: That is the matter that we are going to defer. Of course, we do not want to get ourselves in the attitude by any admission that we are not asking advantage of the presumption of payment as it develops from the statute of limitations.

Mr. Kinsler: What we mean is this. We want it agreed that neither the Updike Grain Company, the corporate taxpayer, nor any of the defendants in this suit have ever paid, (interrupted).

Mr. Brogan: You may make the proof very simple Mr. Kinsler on that. Prove it. Call anybody.

Examination

By Mr. Blaisdell:

Russell C. Anderson, witness for complainant, being duly sworn, testified: that he is in charge of income tax accounting for the Collector of Internal Revenue, Omaha, Nebraska, and has been for the past seven years. Witness is familiar with an assessment of income and excess-profits tax made against the Updike Grain Company for the fiscal period
159 ended June 30, 1917, in the amount of $373,911.54.

Neither that amount or any part of it has been paid. The entire amount is outstanding and unpaid on the books of the Collector at this time-witness has something to do with the listing of the returns filed. Asked: "Do you know whether or not, Mr. Anderson, the Updike Grain Company or any one on its behalf has ever filed form 1031 revised, or form 1103 an excess profits tax return, either one or both for the eleven months period ended June 30, 1917, for the tax provided by the Revenue Act of October 3, 1917?" witness

answered: "our card records would indicate that they did not". The witness was next asked. "Your record shows that no such returns have ever been filed", to which witness answered: "Yes sir."

Cross-Examination

By Mr. Ellick:

They do not file a return on form 1031 revised under the Act of October 3, 1917. But they did file a return on form 1031 revised for the income for the fiscal period June 30, 1917.

Redirect Examination

By Mr. Blaisdell:

Witness could not tell when that return was filed without looking at the card record. There has been none filed since October 3, 1917.

Recross Examination.

Witness keeps a record of the notices of assessment that are sent to the taxpayer. The record shows date when notices were sent and upon what form it was sent. Witness has the record. First notice and demand was sent on form 17 mailed 9-25-20. Form 21, second notice and demand mailed September 20, 1921, and form 69 issued December 22, 1921. Form 69 is warrant of distraint.

160 Witness was asked: "Calling your attention to notice and demand dated July 16, 1921, is that a form of notice and demand that went out of your office?", to which witness answered: "Yes. There were two forms 17 issued. Claim rejected. Form 17, issued July 16, 1921. Form 17. Witness does not find any others besides that.

In none of the notices anad demndas tht witness has referred to was there any claim made for any penalty for failure to file the return. And the books contain no assessment of any penalty against Updike Grain Company for failure to file a return. And so far as witness knows none has ever been made for the fiscal period ending June 30, 1917, under the Act of October 3, 1917. Witness was asked: "When an assessment of the penalty is made against a taxpayer for failure to file a return, that comes through to your books just the same as any other assessment?", to which witness answered: "Yes sir". Witness excused.

Mr. Blaisdell: Complainant offers in evidence as exhibit number 3 a letter dated March 1, 1927, addressed to James Kinsler, United States Attorney, Omaha, Nebraska, by C. R. Nash, Acting Commissioner of Internal Revenue.

Exhibit number 3 was received in evidence and is as follows:

TREASURY DEPARTMENT

WASHINGTON

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE

ADDRESS REPLY TO
COMMISSIONER OF INTERNAL REVENUE
AND REFER TO

GC:C:IRB
220256

MAR 21 1927

Hon. James C. Kinsler,
United States Attorney,
Omaha, Nebraska.

In re: Updike Grain Company,
Omaha, Nebraska.

Sir:

Reference is made to your letter of January 14, 1927 and previous correspondence, with reference to the matter of beginning a suit in equity against the former stockholders of the Updike Grain Company, a dissolved corporation, to collect additional income and excess profits taxes assessed against said corporation in the amount of $373,911.84 for the eleven months' period ended June 30, 1917.

You are hereby authorized to begin suit at once.

A bill of complaint has been prepared in this office, and is herewith transmitted for filing, subject to your approval. Two carbon copies thereof are enclosed. Additional copies will be transmitted as soon as they can be mimeographed, in order that you will have a sufficient number thereof for service upon all of the defendants. Service upon the defendants who reside outside the Judicial District of Nebraska should be made pursuant to the provisions of Section 51 of the Judicial Code, as amended.

You are requested to acknowledge receipt of said complaint, and to advise this office when the suit has been commenced. You may call upon this office, and the Collector of Internal Revenue for the District of Nebraska, for such assistance as you may require in the prosecution of the suit.

Respectfully,

Acting Commissioner.

Enc. 1473
smb.

162 Mr. Blaisdell: Complainant offers in evidence Exhibit number 4, being telegram received by James C. Kinsler, United States Attorney, from Blair, Commissioner of Internal Revenue, authorizing him to file the present suit.

Exhibit number 4 was received in evidence and is as follows:

WESTERN UNION

Service

This is a full-rate Telegram or Cablegram unless its character is indicated by a symbol in the check or in the address.

SYMBOLS

DL	Day Letter
NM	Night Message
NL	Night Letter
LC	Deferred
CLT	Cable Letter
WLT	Week End Letter

NEWCOMB CARLTON, PRESIDENT — J. C. WILLEVER, FIRST VICE-PRESIDENT

The filing time as shown in the date line on full-rate telegrams and cablegrams is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

Received at 1321 Farnam Street, Omaha, Nebr. ALWAYS OPEN

1929 APR 2 PM 4:1

KA515 23 GOVT 1 EXTRA

K WASHINGTON DC 2 501P

BE

JAMES C KINSLER

UNITED STATES ATTORNEY OMAHA NEBR

RELET TWENTY EIGHTH ENCLOSING REDRAFTED BILL OF COMPLAINT UPDIKE GRAIN COMPANY THIS OFFICE APPROVES AND AUTHORIZES FILING REDRAFTED COMPLAINT BEGIN SUIT IMMEDIATELY

BLAIR COMMISSIONER.

"Exhibit 5 is a letter directed to me as United States Attorney at Omaha, Nebraska, and dated March 15, 1927. It comes from the Attorney General of the United States."

"Q. How did that letter come into your hands?"

"A. That is what I wanted to explain. This letter was handed to me in the department,—in the Department of Justice Building in Washington, District of Columbia, and in the office occupied by the attorney general of the United States and the assistant attorney general, and while it is dated March 15, 1927, that date was simply put on there as,—with this object. It was understood at the time that this question had been raised apparently by the pleadings as to whether I had been given,—as to whether the United States attorney at Omaha had been given authority to commence and prosecute this action, and while I was at the office of the attorney general in Washington during the month of February, 1928, just during the past month, I visited Mr. Keys, the special assistant to the attorney general and told him I believed that we should have a letter in our files authorizing me to prosecute this action. And the letter was pre-dated and it it is simply to make the record, Now the reason for that, I might, explain, is this."

"Q. Well, yes, you may. Well just a moment."

"A. Well first I might explain my reason."

"Q. Was that letter which you have in your hand then, delivered to you in the office of the attorney general?"

"A. Yes, sir. In the office of,—in the attorney general's department. In the office of assistant attorney general Willebrandt, who is in charge of income tax matters and in charge of this case and handed to me personally by Mr. Sewall Keys, Special Assistant to the Attorney General, who is here in the trial of this case. I would like to add this to what I have to say. [I would like to add this to what I have to say.] That I have been in Washington in the office of the attorney general two or three times, I am not sure which, for conferences regarding the prosecution of this very case and have been there in conference with the assistant attorney general, Willebrandt, and also with the special assistant to the attorney general, Mr. Keys, all with regard to the prosecution of this action and what should be done and questions of law that had been raised, and have also been over to the general counsel's office and had conferences with Mr. Charest himself regarding the matter. And at all these times the conferences have proceeded upon the fact that this case was here being prosecuted and relating to the details of the

prosecution and the questions of law that were being rais
were discussed."

"Q. Well at these various conferences between the of
of the attorney general and general counsel to the bureau
internal revenue, did you have the full approval of those o
fices in the prosecution of this suit"

"A. Yes sir."

"Q. Now this letter Exhibit 5 which you hold in you
hand, I believe you said that was delivered to you in the offi
of the department of Willebrandt assistant attorne
166 who has charge of prohibition,— (interrupted)"

"A. That has charge of income taxes and in charge o
this identical case, but that letter was handed to me by
Mr. Sewall Keys who is here present in court and who is
Miss Willebrandt's division and who himself has charge
his employees in these income tax cases."

"Q. That is all."

Cross-Examination

By Mr. Ellick:

Mr. Ellick: We have no cross-examination unless you in
tend to offer that exhibit.

Mr. Blaisdell: We offer Exhibit 5 in evidence.

Mr. Ellick: I would like to examine into it."

"Q. This Exhibit 5 you say was prepared in Febru
1928?"

"A. Yes sir."

"Q. And it was post-dated?"

"A. Pre-dated."

"Q. Or pre-dated?

"A. Yes."

"Q. As of March 15, 1927 so it would purport to be
letter as of that date?

"A. Yes, I think so."

Exhibit number 5 was received in evidence and is as fo
lows:

ADDRESS REPLY TO
"THE ATTORNEY GENERAL"
AND REFER TO
INITIALS AND NUMBER

MVF-
5-45-3-

SK-MKP

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

March 15, 1927

James C. Kinsler, Esq.,
United States Attorney,
Omaha, Nebraska.

Sir:

United States v. Nelson B. Updike et al,
Transferees of the Assets of Updike Grain
Company, a Nebraska corporation

The Treasury Department advises that during the month of August, 1917, Updike Grain Company, a Nebraska corporation, converted all of its assets into cash, which was distributed pro rata amongst its stockholders according to their stock holdings; that at the time of the distribution of the corporate assets the corporation was indebted to the Government in the sum of about $374,000 for war income and war excess profits taxes imposed on the corporation by the Revenue Act of October 3, 1917.

It has been decided to commence a suit in equity in the District of Nebraska to compel Nelson B. Updike and all other stockholders of Updike Grain Company who received the assets of the corporation to account to the Government up to the amount of the taxes imposed on the said company, together with interest.

Accordingly you are hereby authorized and directed to commence an action in equity against all of the transferees of the assets of Updike Grain Company to compel them to account for and pay over to the Government the money of the corporate taxpayer received by them as above set forth up to the amount of said taxes imposed on Updike Grain Company, together with interest as provided by law and the costs of the suit.

Respectfully,

For the Attorney General,

(MABEL WALKER WILLEBRANDT)
Assistant Attorney General.

168 Mr. Kinsler: In order that counsel for the defendants may understand just why we are doing what we are doing, I just want to make a very brief statement that will take a couple minutes. Subsequent to and after thorough consideration of this case and conferences in the attorney general's office, we agreed that it was not a suit to collect a tax, but it was a suit to recover trust funds, for money had and received by these defendants for the use of the Government and we thought that we ought to have the authority of the attorney general to maintain this suit to recover a trust fund, and it was for that reason that the letter was procured from the attorney general's office. One other matter I would like, I would like to have either an agreement or else we can call Mr. Updike or some others, that while it is now in evidence that no part of this tax,—that was assessed against the Updike Grain Company has been paid by or on behalf of the corporate taxpayer, it is also admitted that neither Mr. Updike nor any of the other defendants have paid any of the money that they received and which the government alleges to be a trust fund for which this action is brought.

Mr. Ellick: We can not concede that because we claim that the amount that they paid in excess of what they should have paid had they paid this tax, was part of this money.

Mr. Kinsler: As I understand you, you contend that the individual defendants here paid more income tax on their personal incomes during the year 1917 than they would have paid if the corporation had paid this $373,911 in place of turning it over to these defendants. That is a contention in your answer.

Mr. Ellick: Well it resulted in that because they returned more income than they should have returned.

Mr. Kinsler: But aside from that controversy which is raised by the pleadings and which will be eventually passed upon by the Court, I mean, it is agreed that no part of this trust fund has ever been paid over to the government.

169 Mr. Ellick: Well your witnesses testified that nobody paid the tax.

Mr. Kinsler: I understand.

The Court: I think payment here is a defense, and that you do not need to prove that it has not been paid.

Mr. Kinsler: We thought that too, but this is out of an abundance of caution because we don't want to take any chances on anything.

Complainant obtained leave to amend paragraph XXVIII of the Amended Bill of Complaint by interlineation by adding after the words "Internal Revenue" the words "and the Attorney General of the United States" Complainant rests.

Mr. Brogan: It is understood of course that the motion directed toward the petition because it does not state sufficient facts, is still before the Court. We are not waiving that by going on with the evidence. The order of his honor, Judge Woodrough, was that it would be held and decided with the whole case. The rule which provides for a motion to dismiss instead of a demurrer, does provide that that may be postponed and disposed of at the final hearing at the discretion of the Court, and Judge Woodrough exercised that discretion and postponed that application and that is still before the Court and a part of the whole case.

Defendant's Evidence.

It was admitted by counsel for complainant that no proceeding had been commenced by the United States against these defendants or any of them under the provisions of Section 274 or Section 280 of the Revenue Act of 1926. Counsel for complainant also stated that: "This suit in equity against these defendants is the only proceeding that the government has commenced against these defendants or any of them." And it was admitted by counsel for complainant that no sixty-day notices have been sent to any of these defendants at any time pursuant to the provisions of Section
170 274 of the Revenue Act of 1926.

Mr. Ellick: Defendants offer in evidence Exhibit number 6, being a letter written by George L. Loomis, Collector of Internal Revenue, to the Updike Grain Company under date of July 2, 1917, which plaintiff admits was signed by George L. Loomis at that time collector. Exhibit number 6 was received in evidence, without objection and is as follows:

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

OMAHA, NEBR.

July 2, 1917.

Wedike Drain Co.,
625 Grain Exchange,
Omaha, Nebraska.

Gentlemen:

Your notice designating June 30th as the end of your fiscal year has been accepted.

The last return of annual net income filed by you included July 31, 1916. Therefore, a return is due covering the period beginning August 1, 1916 and ending June 30, 1917. Your next return will then be due within sixty days after June 30, 1918, which means on or before August 29, 1918.

Respectfully,

Collector.

CEG.
CFG-FFF

161

172 Mr. Ellick: Defendants offer in evidence Exhibit number 7, pages one and two, being photostatic copy of income tax return of the Updike Grain Company for the 11 months fiscal period, ending June 30, 1917, filed with the Collector of Internal Revenue July 25, 1917, with all the endorsements and notations and stamps upon it—upon the return. Mr. Ellick stated that Exhibit 7 was furnished to defendants by the government and was part of answers under Equity Rule 58 in files.

Complainant objected to the offer for the reason that the offered exhibit was immaterial and not competent to prove any issue tendered by the defendants or any of them; and for the further reason that it appears upon the face of the return that it is a return of annual net income under parts 2, 3, and 4 of the Act of September 8, 1916; and for the further reason that it appears upon the [fact] of the return that it is not a return filed under the Revenue Act of October 3, 1917.

The objection was overruled by the Court and an exception allowed complainant.

Complainant then objected further to the offered Exhibit number 7 on account of what appears to be something stamped on that part of the exhibit which is headed "General Instructions". The stamped impression being on the right side of the page and reading in the first line, "Assessment", in the second line "Tax", dollar sign "373,911.54", and then the word "Penalty" with nothing under it. Then in the next line the word "Basis" above "R. A. R. 6-30-1919" and after those figures an initial, and then in the lower line after the word "Date", January, 1920", and then on the next line at the conclusion of the stamped impression the word "Page" and the figures "14". The word "Line" and the figure "1". The objection is made to this stamp because it is not material or relevant to any issue in the case; and because there is no sufficient foundation laid for the offer of the stamp
173 which is on Exhibit number 7; there is nothing to show who put it on or how it got on or what it means, nor what it has reference to.

The Court: I will reserve ruling on the objection.

Exhibit number 7 was received in evidence over complainant's foregoing objections and is as follows:

TO BE FILLED IN BY INTERNAL REVENUE BUREAU.

Audited by _____

DIST. OF NEBR.
JUL 25 1917
INT. REV.

Form 1031.
(Revised October, 1916.)

37-633-993

INCOME TAX.

THIS PENALTY
FOR FAILING TO MAKE THIS RETURN OR THE MAKING OF THE COLLECTOR OF INTERNAL REVENUE, WITHIN THE TIME REQUIRED BY LAW IS NOT MORE THAN $1,000 AND THE ASSESSMENT IS INCREASED FIFTY PER CENT.

RETURN OF ANNUAL NET INCOME

(Title I, Parts II and III, of the Act of September 8, 1916.)

CORPORATIONS.

(OTHER THAN INSURANCE COMPANIES.)

TO BE FILLED IN BY COLLECTOR.

Collection District No. 4 NEBRASKA

Assessment List No. 4 ____ Page 101 Line 7

Page 3 Line 20

IMPORTANT.

Read this form and all instructions carefully and if an explanatory statement is made, attach it to return proper. Items in explanatory statement should agree with items in return.

Above space to be stamped by Collector, showing district and date filed.

RETURN OF NET INCOME for the { Calendar / *Fiscal } year ended June 30, 1917

by The Upshur Farm Company, a Kansas (Kind of corporation)

and located at 625 Omaha Trust Exchange (Street and number) Omaha (City or town) Nebraska (State)

*If no figures are to be extended opposite any item in the return, the word "None" should be inserted.

1. Total amount of paid-up capital stock outstanding at the close of the year, or if no capital stock, the capital, other than interest-bearing indebtedness, employed in the business at the close of the year	$	7000 00 00
2. Total amount of bonded and other interest-bearing indebtedness outstanding at close of year, exclusive of indebtedness wholly secured by collateral, the subject of sale or hypothecation in ordinary business of the corporation	$	1009 67 91

3. Gross income	Dollars	Cts.
(a) From operations	$ 7026 98 68	
(b) From rentals	rent	
(c) From interest	61 25 36	
(d) From dividends received	642 79 15	
(e) From other sources	116 65 71	
Total gross income	$ 7847 68 90	

Deductions.	Dollars	Cts.
4. (a) Expenses, general	$ 275 46 68	
(b) Payments in lieu of rent	none	
5. (a) Losses sustained charged off	177 06	
(b) Depreciation charged off	none	
(c) Depletion charged off	none	
6. (a) Interest paid (see Note 6a)		

E. R. Cook

_____, being duly sworn, each for himself, deposes and says that he is the _____ of the corporation making the foregoing report and that the statements contained therein, and in any additional list or lists attached to or accompanying the same, are to the best knowledge and belief, true and correct in each and every particular.

M Bruce
President.

Cabore
Treasurer.

GENERAL INSTRUCTIONS.

Returns of net income must be made on or before March 1 with the Collector of Internal Revenue of the district in which is located the principal place of business of the corporation, if made on the basis of a FISCAL YEAR* they must be filed within 60 days after the close of such year.

A return for that portion of the calendar year ending with the date designated as the close of the fiscal year must be filed on or before the 60 days after the closing date of the fiscal year as established.

Every corporation liable to tax under this Act shall render a list of all its subsidiary companies, if any, with the location of the principal place of business of each.

Every corporation not having a place of business in the United States is required to make returns to the Collector of the District in which is located the principal place of business or agency of such corporation in the United States, its return will be made on the capital invested in the business transacted in the United States.

In the case of a foreign corporation having no office or place of business in this country, all net income from interest and dividends will be withheld at the source.

Any person who shall make any false or fraudulent returns or statement with intent to defeat or evade the assessment required by this Act, or who shall aid or assist in the preparation or filing of any false or fraudulent return or statement with intent to defeat or evade the assessment required by this Act, shall be guilty of a misdemeanor, and shall be fined not exceeding $2,000 or be imprisoned not exceeding one year, or both, at the discretion of the court.

SUPPLEMENTARY STATEMENT.

This statement is required to be made by every corporation, joint-stock company, or association, without which the return will not be accepted as complete. The items must be filled in below and bear corresponding numbers, and the totals set out in the above return must agree with the totals herein.

1. Capital stock: Total amount of capital stock issued, including that for which scrip certificates have been issued, and the number of shares into which the capital stock is divided. Give par value of each share. If no par value, the number of shares issued and the value at which they are carried on the books of the corporation at the close of the year. Do not include here any capital stock held in the treasury of the corporation.

Preferred stock	$ 7000 000 00	
Common stock	none	
Total capital stock	$ 7000 000 00	

2. Indebtedness: All interest-bearing indebtedness, for the payment of which the corporation or its property is bound, should be reported below. In the case of banking corporations and like financial institutions, deposits should not be reported as indebtedness. Indebtedness wholly secured by collateral, the subject of sale or hypothecation in the ordinary business of the corporation, should be reported here, but such indebtedness must not be entered under Item 2 above nor be considered in determining the amount of interest deductible under Item 6 (a).

Character of obligation.	Rate of interest.	Principal.
Various Notes	Various	$ 1009 67 91
Total indebtedness		$ 1009 67 91

185

3. GROSS INCOME:

All manufacturing, mercantile, or other corporations which determine their annual gain or loss by inventory are required to state the same in the form indicated below. If the annual income or loss is determined otherwise, the methods employed must be stated in the space provided therefor. In case the annual gain or loss is determined by inventory, merchandise must be inventoried at the cost price, as any loss in subsequent value will ultimately be reflected in the sales during the year when the goods are disposed of.

(a) FROM OPERATIONS:

Per inventory—

Inventory at cost at close of year	$ 11 90 76 95 26 / 15 30 [illegible] 61	
Total		$ 27 [illegible] 92 17
Inventory at cost at beginning of year	$ 26 94 [illegible] 70 91 / 72 [illegible] 61 70	
Total		$ 27 [illegible] 82 61
*Total gain or loss (1) (a), first page		$ 92 [illegible] 55 56

In the case of manufacturing corporations, "Purchases during the year" will include so much of the cost of labor, material or manufacturing, cold or vended, as has not been separately deducted under any item of the return.
Overhead charges should not be included in inventory (see Item 4).

*(If inventory shows loss, make entry in red ink or strike out "gain.")

If inventory is not used, state below method of determining gain or loss from operations:

In case of the sale of capital assets acquired prior to March 1, 1913, the profit or income to be returned will be the difference between the fair market value of such assets as of March 1, 1913, and the price at which they are sold. If acquired subsequent to March 1, 1913, then the profit or income to be returned is the difference between the cost and the selling price.
In the case of the sale of assets acquired prior to March 1, 1913, state—

(1) Original cost of assets..... $ 0

(2) Fair market price or value as of March 1, 1913.....

(3) Price at which assets were sold.....

State how fair market price or value as of March 1, 1913, was determined:

(b) FROM RENTALS:

Rentals to be reported as income will include all payments received in cash or its equivalent as rent on buildings or other property owned by the corporation making the return, as well as all royalties received.

(c) FROM INTEREST:

Interest to be reported as income includes all interest received on bonds or securities owned by the corporation with the exception of interest on obligations of a State or political subdivision thereof or interest upon the obligations of the United States or its possessions, which latter interest for the purpose of information should be extended below:

U. S., STATE, AND OTHER OBLIGATIONS.

Name of obligation.	Amount of principal.	Rate.	Amount of interest received.
Various Notes rec	$ Various Various		$ 54,752.36
Total	$		$ 54,752.36

(d) FROM DIVIDENDS RECEIVED:

Any distribution made or ordered to be made by a corporation out of its earnings or profits accrued since March 1, 1913, whether in stock or scrip or in cash or other property, must be returned by the receiving corporation as income of the year in which the distribution was made or ordered to be made. Stock dividends must be returned to the amount of their cash value and such cash value is held to be the proportionate share of the surplus accrued to the paying corporation since March 1, 1913, as is represented by the stock distributed or ordered to be distributed to the receiving corporation.

(e) FROM OTHER SOURCES:

All other sources from which income has been received, and the amount thereof, should be itemized below.

Commissions	$	1166 59 61
Total	$	1166 59 61

4. EXPENSES, GENERAL:

This item should include only the ordinary and necessary expenses paid within the year in the maintenance and operation of the business and properties of the corporation, itemized as per schedule below, and will not include any disbursements the deduction of which is specially provided for in the return form proper on the reverse side of this form.

Interest paid on indebtedness wholly secured by property collateral the subject of sale or hypothecation in the ordinary business of the corporation as a dealer only in the property constituting such collateral or in the business of funds thereby produced, is not deductible unless it is a business expense to an amount of the interest paid on such indebtedness not in excess of the actual value of the collateral securing it.

All expenses of material, labor, fuel, and other items entering into the cost of goods purchased, sold, or manufactured are deductible under this head as expense, provided such items have been duly charged during or preceding the cost of purchases during the year when the income derived from operations is ascertained through an inventory as set out in Item 3 (a) of this statement.

Expenditures for additional capital which do not add to the value or appreciably prolong the life of property are deductible as expenses, but expenditures for new buildings, permanent improvements or betterments which increase the value of property, or for restoring or repairing property, are not deductible under this or any other item of the return. Such expenditures are properly chargeable to capital account, to be off-set against such sums as disposed of, as aforesaid.

Payments made to officers or employees who are stockholders, which payments are made in the guise of salaries or compensation and the amount of which is based upon the stockholdings of such officers or employees, are not deductible as a business expense.

(a) 1. Labor, wages, commissions, etc	$	157 96 46 61
2. Fuel, light, power, etc		12 66 [illegible] 54
3. Rentals (ordinary)		34 [illegible] 46
4. Repairs, ordinary and incidental		16 50 [illegible] 32
5. Interest on indebtedness wholly secured by collateral the subject of sale, etc		9 08 22
6. Salaries of officers		36 [illegible] 27 1
Agent and Broker		18 08 [illegible] 70
Surgeon		45 08 [illegible] 40
Legal Telephone & Postage		24 [illegible] 46 04
7. Other expenditures (viz): Advertising		7 [illegible] 53 25
Bonding Expense		5 [illegible] 97 98
Exchange		3 [illegible] 70 19
Miscellaneous		4 [illegible] 20 69
Total expenses	$	375 [illegible] 46 52

5. (a) Names of officers and employees to whom salaries of $3,000 or more were paid during the year and amount paid to each. (If the space below is not adequate, a list may be filed under Item 4 (a) containing this information should be attached hereto and made a part hereof.)

Name.	Address.		Amount of salary.
J. M. Geraldine	Milwaukee	Wisc	$ 6,666.66
J. M. Woodford	"	"	4,249.94
J. M. Walker	"	"	3,166.66
J. M. Kennard	Omaha	Nebr	3,600.00
G. B. Bell	"	"	3,000.00
H. W. Kopke	"	"	3,000.00
H. W. Kopke	"	"	7,166.67
J. A. Kuhn	"	"	4,050.00
	Total		$ 36,883.33

Corporations paying to individuals salaries or wages in excess of $3,000 per year are required to withhold the normal tax of 2 per cent (1 per cent for 1916) on the entire amount so paid. Where certificates of exemptions are filed no tax need be withheld on the amount in excess of the exemption so stated. The tax so withheld must be reported on Form 1042, which, together with all certificates of exemption filed, is to be filed with the collector of internal revenue for the district in which the principal office of the business is located not later than March 1.

Notwithstanding the withholding of this tax, the individual receiving income from this and all other sources of $3,000 or more must also make returns on Form 1040.

(b) PAYMENTS IN LOSS OR RENT:

This item should include all royalties and other charges, including any interest payments, which the corporation is required to make by the terms of its title to the real property in which it has no title, interest, or equity. See Rule 6 (c).

6. (a) LOSSES:

Losses deductible under this item must be distinguished from depreciation or shrinkage in the value of capital assets not connected with the business. Losses must be claimed in the year in which sustained, and if by sale or exchange of capital assets, no deduction will be allowed from profits or income of the current year unless the sale was effected within the time limited for the return of such profits or income. Losses of stock in trade, or other property connected with the business, will be computed on the basis of the cost price, or the value as of March 1, 1913, and the selling price.
Losses compensated by insurance or otherwise are not deductible.

Kind of loss.	No. Original shares.	Date sharged off.	Amount charged off.
Personal Accounts Returned Clearance	$ 1799	Various	$ 1799 06
Total			$ 1799 06

What were the declared losses attributed to by each? Various dates.
How were they to ascertained? Monthly Invoice Collection

In cases of losses resulting from the sale of capital assets acquired prior to March 1, 1913, state—

(1) Original cost of assets..... $

(2) Fair market price or value as of March 1, 1913.....

(3) Loss resulting from such sale.....

State also how the fair market price or value as of March 1, 1913, was ascertained:

(b) DEPRECIATION:

The amount deductible on account of depreciation is an amount charged off which merely compensates the loss during the year in the value of personal property by reason of exhaustion, wear and tear. Such amount should be determined upon the basis of the cost of the property and the probable number of years constituting its life. Stocks, bonds, and like securities, as well as any other intangible assets, are not subject to exhaustion, wear and tear within the meaning of the law. Hence any amount charged off as representing a shrinkage in the value of such assets is not deductible either as depreciation or loss.

Depreciation computed on total invoice value of merchandise in stock is not an allowable deduction, since any loss due to the shrinkage in the salable value of the merchandise will be reflected in the sales when the merchandise is disposed of.

Kind of property.	Its cost.	Probable life after acquirement.	Amount of depreciation. This year.	Amount of depreciation. Previous years.
	$ None		$	$
Totals	$		$	$

If buildings, state kind of construction.

(c) DEPLETION:

Depletion applies to the exhaustion of natural deposits, and contemplates a deduction to return to the corporation the capital invested, or in case of purchase prior to March 1, 1913, an amount sufficient to return to the corporation the fair market value at, or cost of, such property on that date. An allowable deduction on account of depletion must not exceed the fair market value in the mine of the product thereof mined and sold during the year, and in case of oil or gas wells the amount deductible should be computed upon the basis of the decline in the settled flow. The amount sought to be deducted on this account must be charged off on the books of the company.

*Kind of property.	Its cost if acquirement to March 1, 1913.	†Fair market value as of March 1, 1913.	Amount of depletion. This year.	Amount of depletion. All years to date.
	$	$ None	$	$

*Coal, iron ore, copper, oil, or gas.
†State how fair market value as of March 1, 1913, was determined

6. (a) INTEREST DEDUCTIBLE:

The amount of interest deductible under this item is the amount actually paid within the year on an amount of bonded or other indebtedness not in excess of the paid-up capital stock outstanding at the close of the year, or if no capital stock, the entire amount of capital (not including interest-bearing indebtedness) employed in the business at the close of the year, viz., in each case, one-half of the interest-bearing indebtedness also then outstanding.

Capital employed in the business, as here used, contemplates the entire capital paid in by the members of the company, including so much of the accumulated surplus as is not in excess of the needs of the business, but does not include any borrowed capital or interest bearing indebtedness.

Interest, so-called, or dividends paid upon preferred capital stock, is not deductible.

Interest deductible under this item includes all interest actually paid within the year not in excess of the limit hereinbefore indicated on any debt for which the corporation or any property in which it has title, interest, or equity is pledged, except interest on indebtedness wholly secured by collateral the subject of sale or hypothecation in the ordinary business of the company, etc., which interest is deductible under Item 4 (a) as a business expense.

INTEREST PAYMENTS ACTUALLY MADE DURING YEAR.

All forms of indebtedness upon which interest was paid should be listed here.

Name or kind of obligation.	Amount of principal.	Rate of interest.	Amount of interest paid.
Various notes	$ Various	Average 6%	$ 98 70 [illegible] 35
Total	$		$ 98 70 [illegible] 35

(b) INTEREST PAID ON DEPOSITS:

Interest paid (by banks) on deposits or on money received for investment and secured by interest-bearing certificates of indebtedness issued by a bank, banking association, loan or trust company is deductible in the entire amount so paid.

7. (a) TAXES—FEDERAL, STATE, ETC..... $ 66 [illegible] 09

(b) TAXES—FOREIGN.....

Taxes deductible under these items are such taxes as are imposed by the United States, by any State or Territory, or by any political subdivision thereof, or by the Government of any foreign country, and are actually paid or accrued on the books of the corporation, not in excess of the amount due and payable within the year for which the return is made, except that taxes imposed under the laws of a foreign Government are not deductible from the income arising or accruing to a foreign corporation by reason of the business transacted or capital invested in this country, and except that taxes paid for local benefits or taxes paid by corporations pursuant to covenants guaranteeing their bonds to be tax-free, are not deductible.

Taxes paid by banks or other corporations on the value of their capital stock outstanding and in the hands of stockholders are not deductible, such taxes not a primary liability of the stockholders, as such, chargeable against their income.

State whether or not this return is made on the basis of actual receipts and disbursements.....

If not, describe fully what other basis or method was used in computing said income.....

187

176 Mr. Ellick: Defendants offer in evidence Exhibit number 8, being excess profits tax return of the Updike Grain Company filed with the Collector of Internal Revenue on August 30, 1917, covering the fiscal 11 month period ending June 30, 1917.

Mr. Kinsler: The government objects to the offer because it is not relevant to the issues, does not tend to prove any issue tendered by the defendants and immaterial, and for further reason specifically that it appears upon the face of the return that it is an excess profits tax return made under the provisions of Title II of the Act approved March 3, 1917, and for the further reason that it appears upon the face of the return that it is not a return made in accordance with the provisions and requirements of the Revenue Act of October 3, 1917.

Complainant's objection was overruled by the Court and an exception duly allowed.

Exhibit number 8 was received in evidence over the foregoing objection of complainant and is as follows:

7709+24

TREASURY DEPARTMENT
INTERNAL REVENUE BUREAU

Form 1095

Collection District NEBRASKA

Assessment List 38-5 AUG 1917

Page 5 Line 23

3714

Audited by

RECEIVED
AUG 30 1917

Collector's stamp, showing district and date filed.

This SUPPLEMENTAL INCOME-TAX RETURN is to be filed by all corporations, joint stock companies or associations, and insurance companies having an annual net income in excess of $5,000 and making income tax returns on the basis of a properly established fiscal year ending with the last day of some month in 1917 other than December 31.

IMPORTANT NOTICE.

Before undertaking to insert any figures in the subjoined form, read carefully all instructions given below.

PAID
AUG 30 1917
GEO. L. LOVEJOY
Collector

EXCESS PROFITS TAX

(Title II, Act Approved Mar. 3, 1917.)

NOTE.—In cases wherein no figures are extended insert the word "None."

SUPPLEMENTAL RETURN OF ANNUAL NET INCOME for the fiscal period from July 21, 1916 to June 30, 1917.

By H. Burke Seed Company, Grain
(Name of person, firm, or corporation.) (Kind of business.)

located at 6 & Cuming Sts. Omaha, Nebr.
(Street and number.) (City or town, and State.)

(The address given must be that of the principal place of business as set out in the main income tax return.)

1. Total amount of actual capital invested and used in the business (not including any borrowed money or property), classified as follows:			
(a) Actual cash paid in	$ 100000 00	✓	
(b) Actual cash value, at the time of payment, of assets other than cash paid in			
(c) Paid in or earned surplus and undivided profits used or employed in the business	100 844 05		
Total invested capital		$ 100 844 05	✓
2. Number of months intervening between January 1, 1917, and closing date of fiscal year		6 (No. of months.)	✓
3. Total net income for [illegible] year as shown on return of annual net income (Forms 1030, 1030A, or 1031)		$ 237 997 52	✓
Deduct amount of actual capital invested as set out in item 1	$ 5000 00 ✓ / $ 168 844 05 ✓	173 844 05	✓
4. Total profits, in excess of exemptions, for full fiscal year		$ 64 153 47	✓
Deduct such proportion of such excess profits as the period from the beginning of the fiscal year to [illegible] bears to the full fiscal year		49951342	✓
5. Net income subject to tax for that part of the fiscal year intervening between January 1, 1917, and [illegible] of the fiscal year		$ 1199 [illegible]	✓
6. 8 per cent of actual capital invested		$ 9595 [illegible]	✓
7. Excess profits tax		$ [illegible]	

Secretary
Treasurer,

of the corporation, joint stock company or association, or insurance company above named, do solemnly swear that the items entered in the foregoing statement are, to the best of my knowledge and belief, true, correct, and complete.

W Burke
President.

Carter Rob
Secretary
Treasurer.

INSTRUCTIONS

Corporations, joint stock companies, or associations, and insurance companies in making their returns of annual net income under the provisions of the "Excess Profits" tax law, no provision was made for reporting the net income for the fiscal year ending with the last day of some month in 1917 other than December 31, 1917. Hence, this form is intended to supplement the regular income-tax return, and will be transmitted to the Collector of Internal Revenue of the district in which the return is filed. It will be revised to meet the requirements for subsequent years, of both the income tax and excess profits tax. Corporations, joint stock companies, etc., whose regularly established fiscal year ending with the last day of some month in 1917 other than December 31, 1917, shall be subject to the tax.

The tax imposed by this title shall be the year ending December 31, 1917, and the title shall be subject to the tax. A tax of 8 per cent annually upon the amount by which the net income of the year exceeds

(1) the actual cash value, at the time of payment, of assets other than cash paid in; and (2) paid in or earned surplus and undivided profits used or employed in the business during the year (including borrowed money or property). As represented by (1) and (2), actual capital invested is the amount of cash (1) or the actual cash value at the time (2) of the tangible assets received by the corporation, etc., for stock, shares, or certificates of interest or profits, and which was actually used or employed in the business during the year; the actual capital invested in the business during the year, which return is made the basis for computing the excess profits tax.

The exemption is to be computed on the actual capital invested in the business at the beginning of the year, that is from January 1, 1917, to the close of a properly established fiscal year (other than the calendar year) ending with the last day of some month in 1917 other than December 31, 1917, and of 8 per cent of the actual capital invested, as the period covered by the return bears to an entire

year. In computing the tax on the basis of a properly established fiscal year (other than the calendar year) ending with the last day of some month in 1917 other than December 31, 1917, the time from January 1, 1917, to the end of such fiscal year is to be considered as a full year, and there should be deducted from the net income of such year that proportion of the taxable income returned, which the time from January 1, 1917, to the end of such fiscal year bears to the full fiscal year. In computing the tax on the excess profits apportioned by the rule outlined, to the period from January 1, 1917, to the end of such fiscal year, the exemption is to be computed on the basis of 8 per cent of the actual capital invested, as the period covered by the return bears to an entire year.

In the preparation of their income tax returns will prepare and verify it, attach it to the income-tax return, and forward it to the Collector of Internal Revenue for the district in which the return is made. If the return is made on the basis of a fiscal year ending subsequent to January 1, 1917, has gone forward, this form should be promptly transmitted to the Collector of Internal Revenue for the district in which the return is made. This form need not be prepared by corporations whose net income for the entire fiscal year, as shown by the income-tax return,

NOTE.—The penalties prescribed for failure to make this return, or for making a false and fraudulent return, are the same as those prescribed for the [illegible] income-tax return.

171

178 Mr. Ellick: Defendants offer in evidence Exhibit number 9, being an amended excess profits tax return filed with the Collector of Internal Revenue at Omaha, September 28, 1917, covering the 11 month period ending June 30, 1917, by the Updike Grain Company.

Mr. Kinsler: The government objects to this offer of evidence for the reason that it is not relevant to the issues, is not competent to prove any issues tendered by the defendants, is immaterial, and for the further specific reason that it appears upon the face of the exhibit that it is an excess profits tax return made in accordance with the provisions of Title II of the Act approved March 3, 1917, and for the further reason that it appears upon the face of the return that it is not a return made in accordance with the provisions and requirements of the Revenue Act of October 3, 1917.

Complainant's objection was overruled by the Court and an exception duly allowed.

Exhibit number 9 was received in evidence over complainant's foregoing objection and is as follows:

No. 25726

TREASURY DEPARTMENT
INTERNAL REVENUE BUREAU

Form 1006

Collection District 37th NEBRASKA
Assessment List No. SEP 1917
Page 7 Line 18

Audited by

Collector's stamp, showing district and date filed.

This SUPPLEMENTAL INCOME-TAX RETURN is to be filed by all corporations, joint stock companies or associations, and insurance companies having an annual net income in excess of $5,000 and making income tax returns on the basis of a properly established fiscal year ending with the last day of some month in 1917 other than December 31.

IMPORTANT NOTICE.

Before undertaking to insert any figures in the subjoined form, read carefully all instructions given below.

PAID
SEP 29 1917
GEO. L. LOOMIS
Collector

AUDITED

Amended

EXCESS PROFITS TAX

(Title II, Act Approved Mar. 3, 1917.)

NOTE.—In cases wherein no figure are extended insert the word "None."

SUPPLEMENTAL RETURN OF ANNUAL NET INCOME for the fiscal period from Aug 1, 1916 to June 30, 1917.

By The Updike Grain Company Grain
(Name of individual, firm, or corporation) (Kind of business)

located at 625 Omaha Grain Exchange, Omaha Neb
(Street and number) (City or town, and State)

(The address given must be that of the principal place of business as set out in the main income tax return.)

1. Total amount of actual capital invested and used in the business (not including any borrowed money or property), classified as follows:			
(a) Actual cash paid in	$ Received		
(b) Actual cash value, at the time of payment, of assets other than cash paid in	None		
(c) Paid in or earned surplus and undivided profits used or employed in the business	100 64460		
Total invested capital			$ 2100 64460
2. Number of months intervening between January 1, 1917, and closing date of fiscal year			1 (No. of months.)
3. Total net income for full fiscal year as shown on return of annual net income (Forms 1030, 1030A, or 1031) heretofore or herewith filed			$ 2391 94420
From which deduct— (a) Specific exemption	$ 75633 / 6000 00		
(b) Eight per cent of total invested capital as set out in item 1	$ 168051 80		1582 48220
4. Total profits, in excess of exemptions, for full fiscal year			$ 7713 35120
From which deduct such proportion of such excess profits as the period from the beginning of the fiscal year to January 1, 1917, bears to the full fiscal year			1 06 86 Less
5. Total "excess profits" apportioned to that part of the fiscal year intervening between January 1, 1917, and the closing date of the fiscal year			$ 1707 28281
6. Rate at which the tax is computed			.08
7. Total amount of tax assessable			$ 136582 62
8.	Additional	Dollars	$ 95953 79

We, [illegible], President, and [illegible], Treasurer, of the above-named company, being severally sworn, each for himself, deposes and says that the items entered in the foregoing statement are, to the best knowledge and belief, true and correct in each and every particular.

Subscribed and sworn to before me this [illegible] day of [illegible] 1917.

[illegible], President.

[illegible], Treasurer.

SEAL.

[illegible]
(Official capacity)

INSTRUCTIONS

1. Forms 1030, 1030A, and 1031, prescribed for the use of corporations, joint stock companies or associations, and insurance companies in making their returns of annual net income for the purpose of the income tax, having been prepared and distributed prior to the passage of the "Excess Profits" tax law, no provision was made for reporting on those forms the information and data required for the proper assessment of the tax imposed by this law. Hence, this form is intended to supplement the regular income-tax return to which it pertains in time, it may be attached; otherwise, when properly verified, it will be transmitted to the Collector of Internal Revenue of the district in which the corporation has its principal place of business. As the regular income tax forms will be revised to meet the requirements for subsequent years, of both the income tax and the excess profits tax laws, this form will be used this year only, and only by those corporations, joint stock companies, etc., whose regularly established fiscal year ends with the last day of some month subsequent to January 1, 1917, and prior to December 31, 1917.

2. Section 200 of Title II of the act approved March 3, 1917, provides that the first taxable year under this title shall be the year ending December 31, 1917, and the title contemplates that all profits, in excess of the specified exemptions, earned subsequent to January 1, 1917, shall be subject to the tax.

3. Section 201 of this title, in addition to the taxes under existing laws, imposes a tax of 8 per cent annually upon the amount by which the net income of the year ending in the sum of $5,000 and 8 per cent of the actual capital invested.

4. Section 202 defines actual capital invested as (1) actual cash paid in; (2) the actual cash value, at the time of payment, of assets other than cash paid in; and (3) paid in or earned surplus and undivided profits used or employed in the business, not including borrowed money or property. As represented by (1) and (2), actual capital invested is not necessarily measured by the par value of the stock, but by the amount of cash (1) or by the actual cash value at the time (2) of the tangible assets received by the corporation and for which shares of stock were issued, as represented by (3), the actual capital invested is the amount of the earned or paid-in surplus and undivided profits which stood to the credit of the corporation at the beginning of the year for which the return is made, and which was actually used or employed in the business during the year, that is, the actual capital invested and upon which the 8 per cent exemption is to be computed is the actual capital invested in the business at the beginning of the year, not including any borrowed money or property. If the return is made for a fractional part of the calendar year, that is from January 1, 1917, to the close of a properly established fiscal year, the exemptions will be such proportion of $5,000 and of 8 per cent of the actual capital invested, as the period covered by the return bears to an entire fiscal year—and the above form will be modified to meet such conditions.

Section 203 provides that in the case of corporations making returns on the basis of a properly established fiscal year (other than the calendar year) ending with the last day of some month in 1917, the tax imposed by this title shall be assessed on that proportion of the taxable income returned, which the time from January 1, 1917, to the end of the fiscal year, bears to the full fiscal year; the purpose of this provision being to levy the tax on the excess profits, apportioned by the rule outlined, to the period from January 1, 1917, to the end of the fiscal year covered by the income-tax return, which return is made the basis for computing the excess-profits tax.

5. Corporations receiving this form in advance of the preparation of their income-tax returns will prepare and verify it, attach it to the income-tax return, and forward it to the Collector. In cases where the income-tax return made on the basis of a fiscal year ending subsequent to January 1, 1917, has gone forward, this form should be promptly prepared and transmitted to the Collector. This form need not be prepared by corporations whose net income for the entire fiscal year, as shown by the income tax return, is less than $5,000.

NOTE.—The penalties attaching for failure to make this return, or for making a false and fraudulent return, are the same as those prescribed for the same neglect with respect to the income-tax return.

180 GORTON ROTH, recalled as a witness in behalf of the defendants, being examined in chief by Mr. Ellick, testified as follows:

That Exhibit Number 10 is a copy of a letter which witness transmitted to the Collector of Internal Revenue at Omaha on or about the date it bears and that Exhibit Number 11 is the answer of the Collector of Internal Revenue at Omaha to the letter Exhibit Number 10 received by witness.

Mr. Ellick: We offer in evidence Exhibit 10.

Mr. Kinsler: Objected to for the reason that it is not within the issues, not material, not competent and for the further reason that it calls for the Collector's interpretation on the question of either the law or the regulations which would be the best evidence of what the provisions or requirements are.

Complainant's exception was overruled by the Court and an exception duly allowed.

Exhibit 10 was received in evidence over Complainant's foregoing objection and is as follows:

4/10

Oct. 2, 1917.

Mr. Geo. W. Loomis,

Collector of Internal Revenue,

Omaha, Neb.

Dear Sir:-

If a corporation is dissolved during the fiscal year, is there any reason why it should make up its final report, [illegible] or is it sufficient under the dissolution or at the end of the fiscal year.

Yours truly,

The Standard Grain Co.

By

AC

183 Mr. Ellick: We offer in evidence Exhibit 11 which is the answer of the Collector to the letter, Exhibit 10.

Mr. Kinsler: Objected to for the reason that it is not within the issues, not material, not competent and for the further reason that it calls for the Collector's interpretation on the question of either the law or the regulations, which would be the best evidence of what the requirements and provisions are.

Complainant's objection was overruled by the Court and exception duly allowed.

Exhibit 11 was received in evidence over complainant's foregoing objection and is as follows:

OFFICE OF THE COLLECTOR
DISTRICT OF NEBRASKA

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
OMAHA, NEBR.

C411

October 3rd, 1917.

Updike Grain Company,
Omaha.
Nebraska.

Gentlemen:

Replying to your letter of October 2nd, you are informed that when a corporation dissolves, it should make a final return and file with the return evidence that the corporation has been dissolved.

The final return is due within sixty days from the end of the fiscal year. It may be filed sooner.

Respectfully,

Geo L Looms

Collector.

EWM-K.

T.D. 45

GENERAL
15996

October 27, 1917.

EPT-CVH

Joseph & Alvin T. Sapinsky,
135 Broadway,
New York City.

Gentlemen:

This office is in receipt of your letter of the 26th instant, in which you ask whether a New York corporation which was dissolved in June, 1917, is liable for additional income or excess profits tax under the Act approved October 3, 1917, or whether it is liable only for the tax imposed by the law in existence at the time of its dissolution.

In reply, you are informed that the corporation which was dissolved in June, 1917, is subject to tax under the Act of September 8, 1916 and under the Act of March 3, 1917. It will not be subject to the taxes imposed by the Act of October 3, 1917, for the reason that the Government can not revive a dead corporation in order to assess taxes which are imposed by laws enacted subsequent to the dissolution of the corporation. The corporation, in making its return for the

year 1917 should also file a return on Form 1065 for excess profits tax, such return to be prepared under the provisions of the Act of March 3, 1917.

Respectfully,

L. R. SPEER

Deputy Commissioner.

BKH

The attention of witness was next called to Exhibit 13 and he was asked to state what that exhibit is, to which he answered "A letter that was sent from our office to the Collector of Internal Revenue at Omaha on December 18, 1917 by messenger."

Mr. Ellick: We offer in evidence Exhibit 13.

Mr. Kinsler: Objected to for the reason that it is not relevant to the issues, wholly immaterial, not tending to prove any issue tendered by the defendants.

Complainant's objection was overruled by the Court and exception duly allowed.

Exhibit 13 being received in evidence over complainant's foregoing objection is as follows:

Dec. 18, 1917.

Mr. Geo. .. Loomis,
Collector of Internal .evenue,
Omaha, Nebr.

Dear Sir:-

Please send me supplemental blanks for account of the following:-

Carbon Coal & Supply Co.
Updike Elevator Co.
Missouri Valley Elevator Co.
E. Stoakham Grain Co.
Milligan Grain Co.
Hynes Elevator Co.
The Updike Grain Co.

Yours truly,

HC

189 Mr. Ellick stated "it is admitted that Exhibit 14 pages 1 & 2 is a photostat copy of the Return of the Updike Grain Company designated 'final report', covering the period from July 1, 1917, to August 28, 1917, filed with the Collector of Internal Revenue at Omaha on January 29, 1918, with the affidavit attached."

Mr. Ellick: We offer in evidence Exhibit 14 pages 1 & 2 photostatic copy of a return of the Updike Grain Company designated "Final report", covering the period from July 1, 1917, to August 28, 1917, filed with the Collector of Internal Revenue at Omaha, on January 29, 1918, with the affidavit attached. We offer pages 1 and 2 with all the endorsements thereon and all notations.

Mr. Kinsler: The offer is objected to for the reason that the exhibit offered is not within the issues of this case, it is not material and it is not competent to prove any issue in the case, and for the further reason that it appears upon the face of the return that it is a return of net annual income under Title I, Parts 2 and 3 of the Act of September 8, 1916, and covers a period from July 1, 1917 to August 28, 1917, and for the further reason that it appears upon the face of this return that it is not a return which is made in accordance with the provisions and requirements of the Revenue Act of October 3, 1917, or of Article 61 of Regulations 33 revised, or Article 10 of Regulations 41 of the Treasury Department. And for the further reason that it does not cover the taxable period in question, and for the further reason that it appears to be on the face of it, a final report made in accordance with the provisions and requirements of the Act of September 8, 1916, and of Article 80 of Regulations 33, that is,
190 the original Regulations 33 which were applicable to the Act of October 3, 1913, and the Act of September 8, 1916, but not applicable in any way to the Act of October 3, 1917. And for the further reason that it appears upon the face of this return that it is a return showing no income of any kind during the period covered by the return.

Complainant's objection was overruled by the Court and exception duly allowed.

Exhibit 14 was received in evidence over complainant's foregoing objection and is as follows:

Mar 27 1918

INTERNAL REVENUE BUREAU.

RECEIVED
JAN 29 1918
COLLECTOR
1ST DIST. OF NEBR.

Certificate of Dissolution Attached

INCOME TAX.

THE PENALTY

FOR FAILURE TO MAKE THIS RETURN [illegible]

RETURN OF ANNUAL NET INCOME.

(Title I, Parts II and III, of the Act of September 8, 1916.)

CORPORATIONS

(OTHER THAN INSURANCE COMPANIES.)

Above space to be stamped by Collector, showing district and date filed.

RETURN OF NET INCOME for the Calendar year 1917

by The Updike Grain Company

and located at Omaha Grain Exchange Omaha Nebraska

(Name of corporation, joint stock company, or association.)

(Street and number.) (City or town.)

(The address given must be that of the principal place of business of the corporation.)

If no figures are to be extended opposite any item in the return, the word "None" should be inserted.

1. Total amount of paid-up capital stock outstanding at the close of the year, or if no capital stock, the capital, other than interest-bearing indebtedness, employed in the business at the close of the year	$	200000 00
2. Total amount of bonded and other interest-bearing indebtedness outstanding at close of year, exclusive of indebtedness wholly secured by collateral, the subject of sale or hypothecation in ordinary business of the corporation	$	645571 91

3. GROSS INCOME:	Dollars.	Cts.	DEDUCTIONS.	Dollars.	Cts.
(a) From operations	$ 10 546 05		4. (a) Expenses, general	$ 79815 97	
(b) From rentals	316 25		(b) Payments in lieu of rent	none	
(c) From interest	24 396 44		5. (a) Losses sustained charged off	11 777 80	
(d) From dividends received	40 52		(b) Depreciation charged off	none	
(e) From other sources	21 947 36		(c) Depletion charged off	none	
Total gross income	$ 57 244 62		6. (a) Interest paid (see Note 6a)	7610 31	
Total deductions	100 679 65		(b) Interest paid by banks on deposits	none	
8. Net income	$ None		7. (a) Taxes, domestic paid	1430 50	
9. Tax assessable at 2%	$		(b) Taxes, foreign paid	none	
10.	$		Total deductions	$ 100 679 65	
Total	$				

W. [illegible] Updike, President, and Morton Roth, Secretary, of the above-named company, whose return of net income is herein set forth, being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in the supplementary statement and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief, true and correct in each and every particular.

Sworn to and subscribed before me this twenty-fifth day of January, 1918.

D. J. White
Notary Public.

(Official capacity.)

W. W. Updike
President.

Morton Roth
Secretary.

GENERAL INSTRUCTIONS.

Time of filing returns.—Returns made on the basis of a calendar year must be filed on or before March 1 with the Collector of Internal Revenue of the district in which is located the principal place of business of the corporation, if made on the basis of a FISCAL YEAR they must be filed within 60 days after the close of such year.

"Fiscal year."—Corporations keeping their books and making returns of annual net income on the basis of a fiscal year other than the calendar year must, not less than 30 days prior to March 1 of the year in which the return would be due if made on the calendar year basis, file with the Collector a notice in writing designating the last day of some month as the close of each fiscal year. A return made on the basis of a fiscal year must be filed within 60 days after the closing date of the fiscal year as established.

Extension of time.—In the case of neglect to file [illegible] period fixed, the Collector is authorized to grant an extension of the filing period not exceeding 30 days from the normal due date, provided such neglect [illegible] and provided an application for such extension is made in writing prior to the expiration of the time for which an extension may be granted. [illegible] Commissioner is authorized to grant such further extension as he may deem proper.

Signatures and verification.—Returns must be signed and sworn to by the president, vice president, or other principal officer, and the treasurer or other financial officer, and must be sworn to before an officer authorized to administer oaths, and the seal of the attesting officer, if he is required to have a seal, must be impressed on the return in the space provided for that purpose.

Subsidiary companies.—The corporation making this return should attach hereto a list of all its subsidiary companies, if any, with the location of the principal place of business of each. Each subsidiary company must make a separate and distinct return.

Foreign corporations.—Foreign corporations subject to the law are required to make returns to the Collector of the District in which is located the principal place of business or agency through which is transacted the business in the United States, or if the corporation has no place of business or agency in the United States, its return will be filed with the Collector of Internal Revenue at Baltimore, Maryland. The gross income to be returned is that received from business transacted and capital invested in the United States, including interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise, and including income derived from dividends on capital stock of [illegible] net earnings of resident corporations, joint-stock companies, or associations whose net income is taxable under this law. The deductions allowed are those losses and indebtedness incident and necessary to the transaction of the business in this country, all as specifically set out in the Act. Foreign taxes are not deductible from the gross income arising and accruing to a foreign corporation from business done or capital invested in the United States. In the case of a foreign corporation having no place of business or agency in the United States and no return is made, the tax on income from interest and dividends will be withheld at the source.

Penalties.—Corporations refusing or neglecting to file returns within the time prescribed by law or rendering false or fraudulent returns shall be liable to a penalty of not exceeding $10,000, and an additional tax of 50 per cent in case of neglect to file the return within the time prescribed by law, and 100 per cent in the case of a false or fraudulent return, will be added to the assessment; provided in case of delinquency, if the return is voluntarily filed without notice from the Collector, and it is shown that delay in filing was due to reasonable cause and not to willful neglect, the 50 per cent additional tax will not be assessed.

Any officer of any corporation required by law to make, render, sign, or verify any return, who makes any false or fraudulent return or statement with intent to defeat or evade the assessment required to be made shall be guilty of a misdemeanor, and shall be fined not exceeding $2,000 or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

SUPPLEMENTARY STATEMENT.

The following information must be furnished by every corporation, joint-stock company, or association, without which the return will not be accepted as complete. The items herein relate to the items listed in the above return form and bear corresponding numbers, and the totals set out in the above return must agree with the totals hereinafter set out.

1. PAID-UP CAPITAL STOCK.

Unissued or treasury stock should not be included in this item, but only such stock as has been actually issued and is outstanding at the close of the year and for which payment has been received. Where the stock issued is payable in installments or assessable, only so much of it as has been actually paid in upon such installments or assessments should be reported.

If no capital stock is issued or if the capital stock is issued without par value, the amount of capital invested in the business at the close of the year, not including borrowed capital, will be entered under this item.

(a) Par value of common stock	$ 200000 00
(b) Par value of preferred stock	$
Total paid-up stock	$ 200000 00

2. INDEBTEDNESS.

All interest-bearing indebtedness, for the payment of which the corporation or its property is bound, should be reported below. In the case of banking corporations and like financial institutions, deposits should not be reported as indebtedness. Indebtedness wholly secured by collateral, the subject of sale or hypothecation in the ordinary business of the corporation, should be reported here, but such indebtedness must not be entered under Item 2 below nor be considered in determining the amount of interest deductible under Item 6 (a).

Character of obligation.	Rate of interest.	Amount.
Bills Payable	Various	645571 91
Total indebtedness		$ 645571 91

SUPPLEMENTARY STATEMENT—Continued.

5. (Gross Income):

All manufacturing, mercantile, or other corporations which determine their capital gain or loss by comparing inventories should attach to this return the inventory upon which the gain or loss shown in the return is computed, unless the method employed is stated in the space provided therefor. In case the amount at which any article is carried in the inventory has been increased or decreased to the cost price, or any loss in selling values will be claimed in an amount during the year, state the facts and the amount of such increase or decrease.

(c) Profit or loss from sales of property:

Kind of property.	Cost or other basis.	Date acquired.	Amount realized.
Personal effects	$ 11792.26	Sept 1907	$ 10992.26
Total			$ 11792.26

When were the deducted items disposed of or paid? August 1917

How were they so ascertained? Last Inventory

In case of income resulting from the sale of capital assets acquired prior to March 1, 1913, state—

(1) Original cost of assets..... $.....

(2) Fair market price or value as of March 1, 1913..... .....

(3) Loss resulting from such sale..... .....

State also how the fair market price or value as of March 1, 1913, was ascertained:

.....

.....

*(If inventory shows loss, make entry in red ink or strike out "gain.")

If inventory is not taken, state below method of determining gain or loss from operations:

.....

.....

.....

In case of the sale of capital assets acquired prior to March 1, 1913, the profit or income to be returned will be the difference between the fair market value of such assets as of March 1, 1913, and the price at which they are sold. If acquired subsequent to March 1, 1913, then the profit or income to be returned is the difference between the cost and the selling price.

In the case of the sale of assets acquired prior to March 1, 1913, state—

(1) Original cost of assets..... $.....

(2) Fair market price or value as of March 1, 1913..... .....

(3) Price at which assets were sold..... .....

State how fair market price or value as of March 1, 1913, was determined:

.....

.....

(b) From Rentals:

Rentals to be reported as income will include all payments received in cash or its equivalent as rent on buildings or other property owned by the corporation making the return, as well as all royalties received.

(c) From Interest:

Interest to be reported as income includes all interest received on bonds or securities owned by the corporation with the exception of interest on obligations of a State or political subdivision thereof or interest upon the obligations of the United States or its possessions, which latter interest for the purpose of information should be entered below:

U. S., STATE, AND OTHER OBLIGATIONS.

Name of obligation.	Amount of principal.	Rate.	Amount of interest received.
Bills Receivable	Various	Various	$ 24396.40
Total			$ 24396.40

(d) Dividends:

Any distribution made or ordered to be made by a corporation out of its earnings or profits accrued since March 1, 1913, whether in cash or stock of the paying company, must be returned by the receiving corporation as income of the year in which the distribution was made or ordered to be made. Such dividends must be returned to the amount of their cash value and such cash value is held to be the proportionate share of the surplus accrued to the paying corporation since March 1, 1913, as so represented by the stock distributed or ordered to be distributed to the receiving corporation.

(e) From Other Sources:

All other sources from which income has been received, and the amount thereof, should be itemized below:

Commissions	$ 1569.36
Sale of Stations	6.72
Total	$ 1576.08

4. Expenses, General:

This item should include only the ordinary and necessary expenses paid within the year in the maintenance and operation of the business and properties of the corporation, itemized as per schedule below, and will not include any disbursements the deduction of which is specially provided for in the return form proper on the obverse side of this form.

Interest paid on indebtedness wholly secured by property collateral the subject of sale or hypothecation in the ordinary business of the corporation as a dealer only in the property constituting such collateral or in the loaning of funds thereby produced, is an allowable deduction as a business expense to an amount of the interest paid on such indebtedness not in excess of the actual value of the collateral securing it.

All expenses of material, labor, fuel, and other items entering into the cost of goods purchased, sold, or inventoried are deductible under this head as expense, provided such items have not been considered in determining the cost or purchases during the year when the income derived from operations is ascertained through an inventory as set out in item 3 (a) of this statement.

Expenditures for incidental repairs which do not add to the value or appreciably prolong the life of property are deductible as expenses, but expenditures for new buildings, permanent improvements or betterments which increase the value of property, or for restoring or replacing property, are not deductible under this or any other item of the return. Such expenditures are properly chargeable to capital account, to be extinguished through annual depreciation allowances.

Payments made to officers or employees who are stockholders, which payments are made in the guise of salaries or compensation and the amount of which is based upon the stockholdings of such officers or employees, are not deductible as a business expense.

(a) 1. Labor, wages, commissions, etc.	$ 44196.66
2. Fuel, light, power, etc.	1665.17
3. Rents (ordinary)	11597.67
4. Repairs, ordinary and incidental	7990.77
5. Interest on indebtedness wholly secured by collateral the subject of sale, etc.	497.37
6. Taxes, Postage, Telegr & Telegh	1626.42
Exchange	9.71
Insurance	7.16
Miscellaneous	3976.62
Advertising Expenses	1416.84
Miscellaneous	5519.13
Total expenses	$ 79815.72

4. (a) 5. Names of officers and employees to whom salaries of $2,000 or more were paid during the year and amount paid to each. (If the space below is not adequate, a list marked "Item 4 (a) 5" containing this information should be attached to this form.)

Name	Address.	Amount.
Total		$

Where sufficient space is not provided for the entry of the information required in the "Supplementary Statement," lists containing full information in the form indicated, should be marked in accordance with the particular item and attached to this form.

Corporations subject to indefinite extension of periods in excess of 6 years are required to withhold the assessment and pay 1 per cent interest on the amount withheld for each year or part of a year in excess of 6 years that elapses between the time the return was due and filed and the assessment made, but not to exceed 5 per cent in all. Corporations subject to indefinite extension of periods in excess of 6 years are required to withhold the assessment and pay 1 per cent interest on the amount withheld for each year or part of a year in excess of 6 years that elapses between the time the return was due and filed and the assessment made, but not to exceed 5 per cent in all. [illegible] of this law, the corporation making [illegible] and all other sources of income or profit not [illegible] during the year [illegible]

6. (a) Insurance as a deduction:

Policy premiums paid or accrued for insurance upon the lives of officers or employees will not be allowed as deductions when the corporation is directly or indirectly a beneficiary under such policies.

(b) Depreciation:

The amount deductible on account of depreciation is an amount charged off which fairly measures the loss during the year in the value of physical property by reason of exhaustion, wear and tear. Such amount should be determined upon the basis of the cost of the property and the probable number of years during which it will last. Stocks, bonds, and like securities, as well as any other property not subject to exhaustion, wear and tear within the meaning of the law. The entire amount charged off as representing a shrinkage in the value of such assets is not deductible either as depreciation or loss.

Depreciation computed on total invoice value of merchandise in stock is not an allowable deduction, since any loss due to the shrinkage in the saleable value of the merchandise will be reflected in the sales when the merchandise is disposed of.

Kind of property.	Its cost.	Probable life after acquirement.	Amount of depreciation. This year.	Amount of depreciation. Previous years.
None	$		$	$
Totals	$		$	$

If buildings, state kind of construction.

(c) Depletion:

Depletion applies to the exhaustion of natural deposits, and corporations claiming deduction for depletion must submit with their return a statement showing the fair market value as of March 1, 1913, on account of the property from which the deposits are or were being taken, and the amount deducted from gross income on account of depletion since March 1, 1913. Depletion is computed upon the basis of the decline in the settled flow. The amount sought to be deducted on this account must be charged off on the books of the company.

*Kind of property.	†Its cost if acquired subsequent to March 1, 1913.	‡Fair market value as of March 1, 1913.	Amount of depletion. This year.	Amount of depletion. All years to date.
None	$	$	$	$

*Coal, iron ore, copper, oil, or gas.

†State how fair market value as of March 1, 1913, was determined.

6. (a) Interest Deductible:

The amount of interest deductible under this item is the amount actually paid within the year on an amount of bonded or other indebtedness not in excess of the paid-up capital stock outstanding at the close of the year, or if no capital stock, the entire amount of capital (not including interest-bearing indebtedness) employed in the business at the close of the year plus, in each case, one-half of the interest-bearing indebtedness also then outstanding.

Capital employed in the business, as here used, contemplates the entire capital paid in by the members of the company, including so much of the accumulated surplus as is not in excess of the needs of the business, but does not include any borrowed capital or interest-bearing indebtedness.

Interest, so called, or dividends paid upon preferred capital stock, is not deductible.

Interest deductible under this item includes all interest actually paid within the year not in excess of the limit [illegible] interest indicated on any debt for which the corporation or any property in which it has title, interest, or equity is pledged, except interest on indebtedness wholly secured by collateral the subject of sale or hypothecation in the ordinary business of the company, etc., which interest is deductible under Item 4 (a) as a business expense.

INTEREST PAYMENTS ACTUALLY MADE DURING YEAR.

All forms of indebtedness upon which interest was paid should be listed here.

Name or kind of obligation.	Amount of principal.	Rate of interest.	Amount of interest paid.
Bills Payable	Various	Various	$ 7610.43
Total			$ 7610.43

(b) Interest Paid on Deposits:

Interest paid (by hospitals) on deposits or on money received for investment and secured by interest-bearing certificates of indebtedness issued by a bank, banking association, loan or trust company is deductible in the entire amount so paid.

7. (a) Taxes—Federal, State, [illegible]

(b) Taxes—Foreign:

Taxes deductible under these items are such taxes as are imposed by the United States, by any State or Territory, or by any political subdivision thereof, or by the Government of any foreign country, and are actually paid or accrued on the books of the corporation, and in excess of the amount due and payable within the year for which the return is made, except that taxes imposed under the laws of a foreign Government are not deductible from the income arising and accruing to a foreign corporation by reason of the business transacted or capital invested in this country, and except that taxes paid for local benefits or taxes paid by corporations pursuant to covenants guaranteeing their bonds to be tax-free, are not deductible.

Taxes paid by banks or other corporations on the value of their capital stock outstanding and in the hands of stockholders are not deductible. Such taxes are a primary liability of the stockholders, as such chargeable against their income.

State whether or not this return is made on the basis of actual receipts and disbursements.....

If not, describe fully what other basis or method was used in computing net income.....

STATE OF NEBRASKA,)
) ss.
COUNTY OF DOUGLAS)

Gerton Roth, being first duly sworn, deposes and says: On and prior to the 28th day of August, 1917, I was the duly elected, qualified and acting Secretary of the Updike Grain Company, and as such Secretary had in my possession all the books, records, corporate seal and charter of the Updike Grain Company.

In the month of August, 1917, the stockholders of the Updike Grain Company, by resolutions duly adopted, voted for and ordered the dissolution of the Updike Grain Company, and the distribution of all of the assets of the corporation among the stockholders. This action of the stockholders had theretofore been authorized by the Board of directors of said corporation at a meeting held on the 18th day of August, 1917.

In pursuance of this action by the Board of Directors and the stockholders, all outstanding stock in the Updike Grain Company was surrendered and cancelled, the assets of the corporation were distributed among the stockholders, and a certificate evidencing such dissolution was filed with the Secretary of State of the State of Nebraska on the 28th day of August, 1917.

Since that date said corporation has transacted no business, nor in any manner exercised any of the powers, privileges or franchises as a corporation under the laws of the State of Nebraska.

Gerton Roth

SUBSCRIBED in my presence, and sworn to before me this 24th day of January, 1918.

D. J. White
Notary Public.

[redacted]

Copy

April 2, 1919.

Honorable Daniel J. Riordan,
House of Representatives,
Washington, D. C.

My dear Mr. Riordan:

Reference is made to the brief and the statement of facts relative to the dissolution of the Updike Grain Company, Omaha, Nebraska, which were recently left by you in this office.

It is contended in the brief that the Updike Grain Company, a corporation organized under the laws of the State of Nebraska, whose property of every description was sold (the proceeds being distributed among the stockholders), and the corporation duly dissolved in 1917, prior to the passage of the Act of October 3, 1917, no one succeeding to the business of the corporation or becoming by agreement liable for its liabilities is not liable for income and excess profits taxes imposed by that Act.

In this connection you are advised that the provisions of the war income tax and the war excess profits tax apply to income for the entire calendar year 1917, although the Act imposing them was not passed until October 3, 1917. To that extent it is retroactive. Similarly, the Income Tax Laws, Act of October 3, 1913, and Act of September 8, 1916, were retroactive. This is not constitutionally objectionable. (Brushaber v. Union Pacific R. R. Co., 214 U. S. 1). The effect is the same so far as income for the year 1917 is concerned, as if the Act had been passed on January 1, 1917. On this principle of construction, the Act of October 3, 1913, was held in Brady v. Anderson, 240 Fed. 668, to impose a tax upon the income of an individual who died during the period for which the tax was assessed, but before the passage of the Act. Article 61 of Regulations 33 (Revised) which is based upon this principle provides as follows:

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G02

in 1917, prior to passage of the war revenue act of October 3, 1917, is subject to tax under the Act of September 8, 1916, as amended, and also to the war income tax and the war excess profits tax imposed by the Act of October 3, 1917 (Brady et al. v. Anderson, 240 Fed., 665). A corporation so situated will make a return on revised Form 1001, covering the period in 1917 during which it was in business prior to its dissolution. If it shall have previously made a return covering this period and shall have paid any excess profits tax under the Act of March 3, 1917, it shall be entitled to credit for the amount of such tax so paid against any excess profits tax assessable against it under Title II of the Act of October 3, 1917."

With regard to the contention that Article 61 of Regulations 33 (Revised) does not apply in the case of the Updike Grain Company for the reason that the corporation had no successor or representative against whom the liability for taxes could be enforced, you are advised that a corporation cannot as against its creditors give away its assets to its stockholders. Its assets are a primary fund for the payment of its debts (Stone v. Virgin, 46 Miss. 316, Stedman v. Eveleth, 47 Mass. 114, Tanger v. Upton, 91 . . . 60). The dissolution of a corporation does not impair its obligations, its assets remaining a trust fund or pledge for the payment of its creditors. Taxes are a liability and are prior in right to all claims except judicial costs (103 Fed. 158). The taxes due from a corporation are legally collectible from the stockholders, or others who received its assets upon its liquidation and dissolution (Op. of Att. Gen. 241, Star Dollar Savings Bank v. United States 11 Wallace 567, 240, (U. S. D. 1918).

It is held therefore that the Updike Grain Company, a corporation organized under the laws of the State of Nebraska, which sold its property and distributed its assets among its stockholders and was duly dissolved in 1917, prior to October 3, 1917, is liable to the income

and excess profits taxes imposed by the Act of October 3, 1917.

Sincerely yours,

[illegible] Roper

Commissioner.

IT:T:EB
BB
MAP

B.B. N 18 Inv. Ltr. to Dist.

198 Memorandum: Pursuant to an order of the trial court written interrogatories were propounded by defendants under Equity Rule 58 to D. H. Blair, Commissioner of Internal Revenue; T. F. Langley, Chief of Proving Section Income Tax Unit, Bureau of Internal Revenue; James J. Drakeford, Revenue Agent in Charge, Omaha, Nebraska; and A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska.

Subsequently pursuant to an order of the trial court additional written interrogatories were propounded by defendants under Equity Rule 58 to D. H. Blair, Commissioner of Internal Revenue; James J. Drakeford, Revenue Agent in Charge, Omaha, Nebraska; and A. B. Allen, Collector of Internal Revenue, Omaha, Nebraska.

Answers to the original and supplemental interrogatories were duly made under oath by the respective officers interrogated and all questions and answers are in the files of this suit in the office of the clerk of the Court.

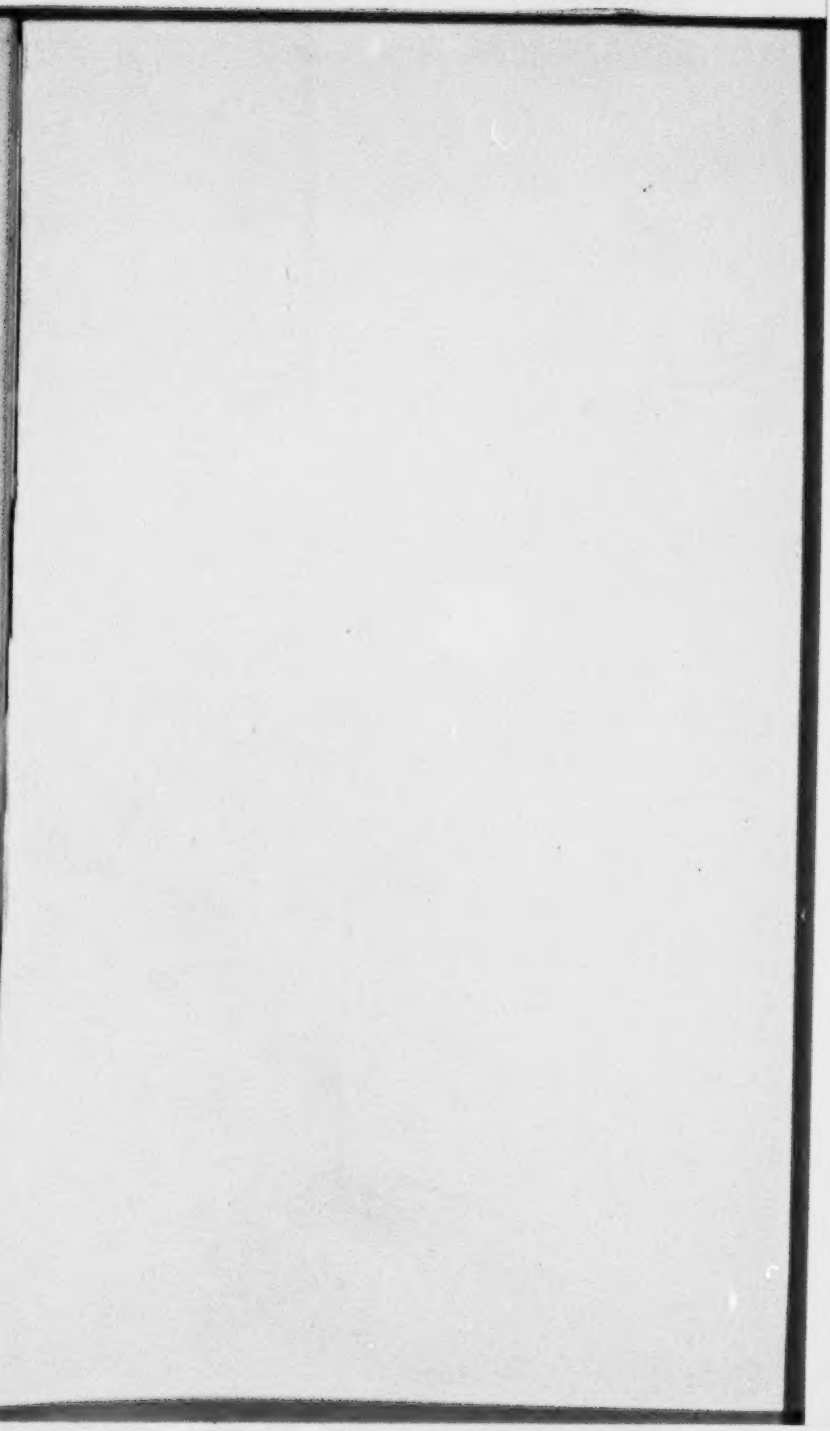
"Mr. Kinsler: We have no objection, your honor, to letting all of the interrogatories go in with all the answers. We will shorten it right up that way. All the interrogatories and all of the answers, both the original interrogatories and the supplemental interrogatories, original answers and supplemental answers and have everything before the court."

Mr. Ellick: I offer in evidence of the original interrogatories Questions, 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 13, 15, 16, 17, 18, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 45, 54, 55, 56, 58, 61, 62, 63, 64, and 69 and the answers of David H. Blair, Commissioner of Internal Revenue, to those interrogatories.

The foregoing interrogatories offered in evidence by the defendants, together with the answers thereto, and documents and exhibits therein referred to were received
199 without objection and are as follows:

D. H. Blair, Commissioner of Internal Revenue, answering Interrogatories 1 and 2:

I have in my possession or under my control the original income tax return of the Updike Grain Company of Omaha, Nebraska, for the fiscal year ending June 30, 1917, subscribed July 24, 1917 and filed July 25, 1917. Said return was received in the office of the Commissioner of Internal Revenue August 4, 1917; a photostat copy is hereto attached. (Pho-



tostat copy referred to is same as Exhibit 7 already received in evidence).

Answer to Interrogatory Number 3:

No assessment of income, war income or excess profits taxes was endorsed upon said return. A notation was made upon said return indicating that an additional tax in the sum of $373,911.54 for the eleven months' period ended June 30, 1917, had been determined to be due from Updike Grain Company and should be assessed.

Answer to Interrogatory Number 4:

No assessment endorsed upon said return as explained in answer to Interrogatory Number 3.

Answer to Interrogatory Number 5:

The amount of additional tax noted upon said return was computed and determined by the Corporation Audit Division of the Income Tax Unit; the determination being first made by an auditor of said division, based upon a report received from the Revenue Agent in Charge, at Omaha, Nebraska, under date of October 26, 1918, and a supplemental report from the same source dated June 30, 1919, and thereafter approved by the Head of said division.

Answer to Interrogatory Number 7:

200 There was no assessment of additional income and excess profits taxes endorsed upon said return. Upon the determination by the Corporation Audit Division of the amount of additional tax due from Updike Grain Company, as above stated, a rubber stamp impression was made upon the return of the words "Assessment", "Taxes", "Penalty", "Basis", "Date", "Page", and "Line" with appropriate blanks to be filled indicating the amount of the tax to be assessed (and the penalty, if any), together with the basis thereof, the date of assessment, and the page and line of the assessment list on which the tax would later appear.

Concurrently with the making of said rubber stamp impression, the amount of the proposed assessment, to-wit: $373,911.54, was inserted in the blank space opposite the word "Tax", also the letters and figures "RAR 6-30-1919" were inserted, indicating that the proposed assessment was based upon a Revenue Agent's report of June 30, 1919. Thereafter the Corporation Audit Division transmitted the return, together with a summary sheet showing the additional assessment to be made to the Proving Section of the

Income Tax Unit, where the additional assessment list and Commissioner's certificate were prepared. Said additional tax appeared upon the January, 1920 additional income tax assessment list, page 14, line 1. Said list was signed by J. H. Callan, Acting Commissioner of Internal Revenue, under date of January 27, 1920.

Thereafter, the words and figures "January 1920, 14-1" were placed upon the return in the blank spaces above mentioned, indicating that the additional tax had been assessed upon the January, 1920 list on page 14 at line 1.

The aforesaid rubber stamp impression upon said return, including the notation made in connection therewith, are no part of the assessment of said additional tax, but the same is simply a memorandum placed upon the return for the information and guidance of persons connected with the Bureau of Internal Revenue; first, that an assessment of additional tax was proposed to be made, and second, when the blank spaces following the words "Date", "Page", and "Line" were filled in, that the additional tax had been assessed.

The said additional tax of $373,911.54 is a tax imposed upon the Updike Grain Company by the Revenue Act of October 3, 1917. The "return" referred to in this answer is the return which, as appears on its face, was made and filed by Updike Grain Company pursuant to the provisions of the Revenue Act of September 8, 1916.

Answer to Interrogatory Number 8.

The aforesaid assessment was not endorsed upon said return. The computation, determination and assessment of said tax, was made according to the customary procedure prevailing in the Income Tax Unit.

Answer to Interrogatory Number 9.

This case was handled the same as all other cases of a similar character.

Answer to Interrogatory Number 10.

As noted above no assessment was endorsed upon the return. The memorandum of amount of tax to be assessed was placed upon the return in the Corporation Audit Division of the Income Tax Unit. There is no record of the name of the particular auditor who made said notation.

Answer to Interrogatory Number 11.

As previously stated there was no assessment endorsed upon the aforesaid income tax return. The procedure, above mentioned, in assessing the additional tax against
202 Updike Grain Company, was in accordance with the custom and practice prevailing in the office of the Commissioner of Internal Revenue respecting the assessment of additional income and war profits taxes.

Answer to Interrogatory Number 13.

As heretofore stated, no assessment was ever endorsed upon any income tax return, although as explained in detail above, it was the practice of the Audit Division, when it determined that there was an additional tax due from a taxpayer, to note the amount to be assessed, upon a return filed by the taxpayer for the taxable year in question.

Answer to Interrogatory Number 15.

Assessment lists were made from time to time during the years 1919 and 1920 upon which it was the practice to enter assessments of additional income and excess profits taxes found to be due from taxpayers for the year 1917 or for fiscal years ended during 1917.

Answer to Interrogatory Number 16.

As heretofore stated no assessment was endorsed upon any return but after a notation of the tax to be assessed was placed upon a return by the Audit Division, such return, together with a summary sheet prepared by the Audit Division (which is merely a memorandum showing the names of taxpayers and amounts to be assessed), was forwarded to Proving Section of the Income Tax Unit, where the assessment lists are prepared in duplicate for the signature of the Commissioner of Internal Revenue. After being signed in duplicate by the Commissioner of Internal Revenue, one copy of said list is retained in the office of the Commissioner and the other copy forwarded to the Collector of Internal Revenue.

Answer to Interrogatory Number 17.

203 The assessment of $373,911.54 additional income and excess profits taxes against the Updike Grain Company for the eleven months' period ended June 30, 1917, was assessed upon January, 1920 additional income tax assessment list, page 14, line 1. The Commissioner's certificate attached

to said list was signed by J. H. Callan, Acting Commissioner of Internal Revenue, under date of January 27, 1920.

Answer to Interrogatory Number 18.

A photostat copy of the Commissioner's certificate and additional assessment list above mentioned are attached hereto.

TAX LIST REPORT

ADDITIONAL ASSESSMENTS.

ASKA List: INCOME TAX (Kind of tax.) JANAURY 1920 (Month or section.) Dated

ER OF INTERNAL REVENUE:

hat the following transactions affecting the tax list described above have been recorded on my books this month:

....., Collector.

TAXES COLLECTIBLE		AMOUNTS	✓	FOR COMMISSIONER'S OFFICE
ward from last report		$		$
month				
made by Collector (increases)				
nissioner { Form 23 D, dated	$			
nissioner { Form 23 A, dated	$			429 974 31
Districts { (District.)	$			
Districts { (District.)	$			
Districts { (District.)	$			
rged to taxpayers' accounts)				
rged { Paid by Collector, per abstract	$			
nts). { Certified to Commissioner for payment, per abstract	$			
be accounted for				429 974 31
tricts { (District.)	$			
tricts { (District.)	$			
tricts { (District.)	$			
{ By order of Commissioner	$			
{ By Collector, per abstract	$			
Taxes Collectible at close of month		$		$
ABATEMENT CLAIMS PENDING				
ward from last report		$		$
d during month				
be accounted for				
llowed during month (see Item 11)				
ected during month { By order of Commissioner	$			
ected during month { By Collector	$			
abatement claims pending		$		$

COMMISSIONER'S CERTIFICATE

t I have made inquiries, determinations, and assessments of the taxes, penalties, etc., of the above classification specified in this nts of taxes, penalties, etc., stated, as corrected by the statement of differences, are due from the individuals, firms, and corpora- s such amounts are placed and that the amount chargeable to the Collector is as follows:

	TOTAL DEBITS	TOTAL CREDITS	BALANCE
	$ 429 974 31	$	$ 429 974 31

Approved by the Comptroller of the Treasury
July 24, 1919

TAX LIST REPORT
ADDITIONAL ASSESSMENTS.

District: NEBRASKA List: INCOME TAX (Kind of tax.) JANAURY (Month or period)

TO THE COMMISSIONER OF INTERNAL REVENUE:

I hereby certify that the following transactions affecting the tax list described above have been re

LINE NO.	TAXES COLLECTIBLE		A
1	Balance brought forward from last report		$
2	Returns filed during month		
3	Revisions in returns made by Collector (increases)		
4	Received from Commissioner { Form 23 D, dated	$	
	{ Form 23 A, dated	$	
5	Transfers from other Districts { (District.)	$	
	{ (District.)	$	
	{ (District.)	$	
6	Returned checks (charged to taxpayers' accounts)		
7	Refund vouchers (charged to taxpayers' accounts). { Paid by Collector, per abstract	$	
	{ Certified to Commissioner for payment, per abstract	$	
8	Total to be accounted for		
9	Collections		
10	Transfers to other Districts { (District.)	$	
	{ (District.)	$	
	{ (District.)	$	
11	Abated during month { By order of Commissioner	$	
	{ By Collector, per abstract	$	
12	Balance of Taxes Collectible at close of month		$

ABATEMENT CLAIMS PENDING

13	Balance brought forward from last report		$
14	Abatement claims filed during month		
15	Total to be accounted for		
16	Abatement claims allowed during month (see Item 11)		
17	Abatement claims rejected during month { By order of Commissioner	$	
	{ By Collector	$	
18	Balance of abatement claims pending		$

COMMISSIONER'S CERTIFICATE

I HEREBY CERTIFY that I have made inquiries, determinations, and assessments of the taxes, penalties, etc., c
list and find that the amounts of taxes, penalties, etc., stated, as corrected by the statement of differences, are du
tions opposite whose names such amounts are placed and that the amount chargeable to the Collector is as fo

	TOTAL DEBITS	
As reported by Collector	$ 429 [illegible] 31	$
As audited by Commissioner		
Items allowed on Form 23 D, No.		

UNITED STATES INTERNAL REVENUE

ASSESSMENT LIST

District NEBRASKA

INCOME TAX

(Classification)

	NAME AND ADDRESS OF TAXPAYER	DESCRIPTION OF ITEM	TOTAL TAX	DATE PAID
0	UPDIKE GRAIN CO. 625 OMAHA GRAIN EXCHANGE, OMAHA, NEBR.			
1	" "	6/30/17 11 M08.39500995 R.A.R.6/30/19	373 911 54	
2				
3				
4				
5				
6				

UNITED STATES INTERNAL REVENUE

ASSESSMENT LIST

SKA

INCOME TAX

(Classification)

List JANUARY 1920

ADDRESS OF TAXPAYER	DESCRIPTION OF ITEM	TOTAL TAX	DATE PAID	REMARKS
CO. AIN EXCHANGE,	— —			—
	6/30/17 11 MOS. 39500995 R.A.R. 6/30/19	373 911 54		